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WOOD'S

PRACTICE EVIDENCE

FOR READY USE IN THE TRIAL OF CAUSES

BY

H. G. WOOD

Author of "FIRE INSURANCE," "LANDLORD AND TENANT," "STATUTE OF FRAUDS."

SECOND EDITION

BY

ARTHUR W. BLAKEMORE

Author of "ABOLITION OF GRADE CROSSINGS."

ALBANY, N. Y.,
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Preface to the First Edition.

This work, upon which I have been engaged at odd intervals for the last eight years, is intended for practical use in the trial of causes—a sort of "handy" book for reference in the multifarious questions that arise in the trial of causes as to the admissibility of certain classes of evidence and to the settlement of which the elementary rules do not always afford a ready solution. As far as practicable this work is intended to remedy the inconvenience resulting from this condition. The work is not intended as an elementary treatise, nor is it a mere digest, but may be said to be intermediate between the two. It gives the gist of the leading cases, whose doctrine is well and firmly established both as to the rules and the exceptions thereto, and I believe will be found to be reliable. There is no field of the law in which the general rules are more firmly established than in that relating to the law of evidence; but at the same time, the *exceptions* to these rules are so numerous that there is no department of the law in which more difficulty is experienced in ascertaining where the rules apply than in this. I have endeavored in a large measure to overcome this difficulty, and have drawn largely from the cases and the text-books—especially the English text-books—to this end. Of course I have not been able to cover or meet every possible question, but have gone as far as the best class of cases (English and American) warrant, in solving them. The work covers a field which is not, except to a limited extent, covered by the elementary or other text-books, and I trust will be found useful as a guide, and as an authority, in the trial of causes in which these questions arise. The index is very full, and will be found to be a "*key*" to the points covered.

New York, *March* 22, 1886.

Preface to the Second Edition.

During the twenty years since the first edition of this book was given to the legal profession the courts have in various directions been busily engaged in amplifying and extending the law of evidence to meet the demands of modern commercial life. This development is reflected in the present edition. The editor has inserted thirteen hundred new cases of this period, all of which he has personally examined and all of which contain some intelligent discussion of the question decided, which new material made it necessary to rewrite entirely some sections in the first edition and add some new sections, all of which will be found readily available through the very complete index.

The various divisions of the hearsay rule are in most part well established and there is little new law upon them, as is also the case with the law of admissions and of public documents. The parol evidence rule during this period has been amplified by many decisions which evidence the efforts of the courts to find the real intention of the parties to a contract by all possible aid where necessary outside of the writing itself. There is a noticeable tendency in the law to admit entries made fairly in the usual course of business, although the entrant is not available, as will be noted by reference to chapter 13 of this section. An interesting legal conflict is being waged concerning the admissibility of declarations of a party as part of the *res gestae*, but the most extensive development of the law of evidence during this period has been under the topic "judicial notice," where the courts are tending more and more to shorten trials by taking notice of various matters of common or judicial knowledge.

Boston, *April* 2, 1906.

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EVIDENCE.

CHAPTER I.

Best and Secondary Evidence.

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8. Search, sufficiency of.
9. Requisites of notice to produce paper in possession of the adverse party.
10. When notice to produce is unnecessary.
11. Effect of notice to produce papers.
12. What secondary evidence of writings sufficient.

Sec. 1. Best evidence rule. What is primary evidence?

The so-called best evidence rule is not a strict rule of evidence but rather a broad general principle founded on the two considerations that the administration of justice is too important to be governed by anything but the very best obtainable evidence, and further, that the failure of a party to introduce the best evidence at his command is justly regarded as raising the suspicion that he is not dealing in good faith with the judicial tribunal. The rule may be said to be that *the best, or highest kind of evidence which the nature of the case admits of, must be given,* and evidence which presupposes better evidence behind, in the party's possession or power, is secondary evidence.[1] Thus, where a contract has been

[1]Tayloe v. Riggs, 1 Pet. (U. S.) 391; Colton v. Campbell, 3 Tex. 493; Newsom v. Jackson, 26 Ga. 241; Haitt v. Moulton, 21 N. H. 586; The Queen's Case, 2 Br. B. 287; Union Bank v. Ellis, 3 La. An. 188; Greely v. Quimby, 22 N. H. 335; Morton v. White, 16 Me. 53. For a learned history and analysis of the "best evidence" rule see Thayer's Preliminary Treatise on Evidence, pp. 484-507. Primary evidence, as stated in the text, is that which the law recognizes as affording the greatest certainty of the fact in question, and, until it is shown that the production of this class of evidence is out of the power of the party, no other proof of the fact is, in general, admissible. All evidence falling short of this, is secondary, and the question whether evidence is primary or sec-

reduced to writing, the writing is the best evidence of its contents, *and must be produced, unless the party satisfies the court that it has been lost or destroyed, or, without fault on his part, he is unable to produce it.*[2] So, where an auctioneer's memorandum of a sale becomes important, the original memorandum, alone, is insufficient to establish the sale, and a mere copy thereof is not admissible.[3]

In some of the cases it is held that a copy of a message sent by telegraph is not competent evidence, unless the original dispatch, left at the transmitting office, is shown to have been destroyed or lost,[4] or that the original, and the office from which it was sent, are beyond the jurisdiction of the court.[5] The current authorities seem to be almost uniformly to the effect that whether the telegram filed with a telegraph company for transmission, or the one delivered by the telegraph company to the person addressed, after transmission, is the original, for the purpose of evidence, depends upon whether the telegraph company is the agent of the person sending the telegram, or of him to whom it is sent; that, if one initiates correspondence by telegraph, he selects

ondary, has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party, in the particular case, may be placed. It is a distinction of law, and not of fact; *referring only to the quality, and not to the strength of the proof*, Richardson *v.* Milburn, 17 Md. 67, or, as was said in the case last cited, *to its grade and not to its conclusiveness.*

[2] Felton v. McDonald, 4 Dev. (N. C.) L. 406; Wilson v. Young, 2 Cr. (U. S. C. C.) 33; Williams v. Jones, 12 Ind. 561; Brewton v. Driver, 13 Ala. 826; Fitzgerald v. Adams, 9 Ga. 471. Where a contract has been executed in duplicate, each part is an original. Totten v. Buey, 57 Md. 446. The rule requiring the production of the best evidence, as stated *supra*, excludes only that evidence *which itself indicates the existence of more original sources of information;* and, consequently, where there is no substitution of *inferior* evidence, but only a selection of *weaker*, instead of *stronger* proofs, the rule is not infringed. 1 Phillips on Ev. 418; Taylor on Ev. 281.

[3] Davis v. Robertson, Mill (S. C.) Const. 71.

[4] Smith v. Easton, 54 Md. 138; 39 Am. Rep. 355. This must be understood, however, as applying only in cases where the telegram is relied upon to sustain the action, or to establish a substantial fact, and in such cases, it is held that even the original is not admissible unless it is proved to have been sent by the party by whom it purports to have been, and this rule has been held to apply where a message has been sent to a party, and a reply purporting to come from him has been received in due course, the courts holding that the same rule in such cases does not apply, as is held in relation to letters received in due course by mail. Hawley v. Whipple, 48 N. H. 487. The message must be shown to have been sent by the party from whom it purports to have come, either by proof that it was in his handwriting, or that it was sent by his direction or authority. United States v. Babcock, 3 Dill. (U. S. C. C.) 576.

[5] Whilden v. Merchants, &c., Bank, 64 Ala. 1.

the telegraph company as his agent, which agency continues throughout the correspondence, and a telegram delivered to the company for transmission in reply to the one first sent is the original, for the purpose of evidence. So, where one telegraphs to another asking whether he will pay for certain medical services the reply telegram delivered in answer to the telegraph company is the original for evidentiary purposes, and the one delivered by the telegraph company to the first sender is but a copy.[6]

It is often difficult to say what is primary and what secondary evidence. A carbon copy of a letter which is made at the same time and by the same imprint of type with the letter may well be regarded as a duplicate original with the letter itself,[7] and where a contract is executed in duplicate a party who has lost his copy is not entitled to introduce secondary evidence of it until he has given his opponent notice to produce his copy, as both copies are primary evidence.[8] If a copy of a letter is the subject matter of correspondence between the parties, the copy and not the original is admissible as primary evidence.[9] Where meteorological reports are made up on loose sheets, which are copied in a letter book and the sheets are sent to Washington, and the letter book is kept as the record of the office, the book and not the sheets was held to be the original record.[10] A title by deed must be proved by the production of the deed itself;[11] but where a deed has been mutilated or where a plat

[6] Bond v. Hurd (Mont., 1904), 78 Pac. 579. Where the plaintiff makes a telegraphic offer to the defendant, to which the latter replies, the telegram of the plaintiff as received at its destination and the telegram of the defendant as he delivered it to the company are the best evidence. Cobb v. Glenn Boom & Lumber Co. (W. Va., 1905), 49 S. E. 1005. When one sends a telegram he makes the company his agent for the transmission and delivery of his communication and the transcribed message actually delivered is primary evidence and if it is destroyed all other evidence of its contents is secondary. Magie v. Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660, where the recollection of the receiver of the telegram was received in evidence. See, also, Laviland v. Green, 20 Wis. 431; Durkee v. Vt. Central R. R. Co., 29 Vt. 127; Trevor v. Wood, 36 N. Y. 307; Dunning v. Roberts, 35 Barb. (N. Y.) 463. A telegram is not admissible in evidence on testimony that the sendee found it in his office without proof that it came from the telegraph office, or who wrote, or who signed it, where, when, or from whom it came, except as appears upon the paper. Reynolds v. Hinrichs, 16 S. D. 602, 94 N. W. 694. But see Brownlee v. Reiner (Cal., 1905), 82 P. 324.

[7] Chesapeake & O. R. Co. v. F. W. Stock & Sons (Va., 1905), 51 S. E. 161.

[8] Norris v. Billingsley (Fla., 1904), 37 So. 564.

[9] Simonds v. Cash (Mich., 1904), 99 N. W. 754.

[10] Chicago & E. I. R. Co. v. Zapp, 209 Ill. 339, 70 N. E. R. 623.

[11] Alivon v. Furnival, 1 C., M. & R. 292. So, on reference to a deed or

referred to in the deed is missing from the deed the record of the deed and the plat are admissible to prove them;[12] and generally it may be said that *the contents of a written instrument which is capable of being produced must be proved by the instrument itself, and not by parol evidence.*[13] There are *three* classes of cases to which this rule applies: *First. Those instruments which the law requires to be in writing;*[14] *second, Those contracts which the parties have reduced to writing;* and *third, All other writings, the existence of which is disputed, and which are material either to the issue, or to the credit of a witness.*

When a writing does not fall under either of these heads, there is no ground for its excluding oral evidence; as, if a *written* communication is accompanied by a *verbal* one to the same effect, the verbal communication may be received as independent evidence, but not to prove the contents of the writing, or as a substitute for it. It is upon this ground that the fact of payment may be shown by parol, although a receipt in writing was given;[15] or that a verbal demand for goods may be shown in an action of trover, although a written demand was made at the same time;[16] or that what the testimony given by a witness upon a trial was, may be shown by parol, although the judge or clerk took it down in writing, but which the witness did not sign.[17]

Before a deposition can be admitted in evidence, it must be shown that the party who made it cannot be produced by the party offering it, and that at the time when it was taken a cause therefor, coming within the provision of the statute relating thereto, existed;[18] and in order to render a deposition taken *in perpetuam*

any other *attested* instrument, its due execution must in general be proved, *if questioned*, by the production of the attesting witness, if alive, sane, and within the jurisdiction of the court, and can be found by diligent inquiry. Wright v. Tatham, 1 Ad. & El. 31. See *post* § , *Proof of Attested Instruments.*

[12] Senterfeit v. Shealy (S. C., 1905), 51 S. E. 142.

[13] The Queen's Case, 2 B. & B. 289; Turner v. Singleton, 2 A. K. Mar. (Ky.) 15; Morrill v. Otis, 12 N. H. 466. A letter from a corporation written and signed on the typewriter may be identified by a statement by the witness who received it as the signature of the corporation whether or not it was in answer to a letter written by the witness. Huber Mfg. Co. v. Claudel (Kan., 1905), 80 Pac. 960. The existence of a municipal ordinance cannot be proved by parol. Cleveland A. & C. R. Co. v. Workman, 66 Ohio, 509, 64 N. E. R. 582.

[14] Fitzgerald v. Adams, 9 Ga. 471.

[15] Jacob v. Lindsay, 1 East, 460. See *post* § .

[16] Smith v. Young, 4 Camp. 439.

[17] Jeans v. Wheeden, 2 M. & R. 486.

[18] Harvard v. Maale, 2 H. & J. (Md.) 249; Dunn v. Dunn, 11 Mich. 264; Livermore v. Eddy, 30 Mo. 547; Wetherell v. Patterson, 31 id. 458. In the cases cited from Missouri it was

admissible, it must be shown that the person making it is dead, because in all cases the *oral evidence* of a witness, given upon the stand, in the presence of the triers, is regarded as of a higher kind than that given by way of deposition. But a deposition taken by one party and filed in court may be used as evidence by the other party as a matter of right, in the absence of a statute to the contrary.[19]

The rule that secondary evidence is not admissible to take the place of a writing applies to notes,[20] warrants,[21] executions,[22] returns on executions,[23] bills of sale,[24] subscriptions to stock, etc.,[25] letters of administration,[26] maps,[27] records,[28] mortgages,[29] deeds of gift,[30] letters,[31] telegrams,[32] receipts,[33] deeds,[34] and indeed any and all writings, the contents of which are material to the issue. Where deeds, contracts, etc., are executed in duplicate by all the parties, each part is treated as an original,[35] but where each part is executed by one

held that where the cause for taking the deposition was, that the witness was about to leave the State, it must be shown by other evidence than that contained in the certificate that the witness is absent from the State at the time of the trial.

[19] Wallace, Muller & Co. v. Leber, 69 N. J. 312, 55 A. 475, and cases there cited.

[20] Merrill v. Timbrell (Iowa, 1904), 98 N. W. 879.

[21] State v. Atherton, 16 N. H. 203; United States v. Wary, 1 Cr. (U. S. C. C.) 312; Hackett v. Wing, 6 Allen (Mass.), 58.

[22] Swetser v. Drove, 19 Ala. 255.

[23] Rand v. Hadlock, 6 N. H. 514; McDade v. Mead, 18 Ala. 214.

[24] Yarbrough v. Hudson, 19 Ala. 653.

[25] Cincinnati R. R. Co. v. Cochran, 17 Ind. 516.

[26] Smith v. Wilson, 17 Md. 460.

[27] Pool v. Myers, 21 Miss. 466.

[28] Thelluson v. Shedden, 2 N. R. 228; Bogart v. Green, 8 Mo. 115; Graham v. O'Fallow, 3 id. 507. But where a record, although required by law, has not been made, the facts which should so offer may be proved by parol. Gillett v. Commissioners of Lyon, 18 Kan. 410.

[29] Ord v. McKee, 5 Cal. 515.

[30] Andrews v. Hooper, 13 Mass. 472; Rains v. Prettyman, 29 Ga. 529.

[31] Farrell v. Brennan, 32 Mo. 328; Kidd v. Crammell, 17 Ala. 648; Guerrin v. Hunt, 6 Minn. 375; Halcombe v. State, 28 Ga. 66.

[32] Williams v. Brickell, 37 Miss. 682; Matteson v. Mayes, 25 Ill. 591. But see Cairo, &c., R. R. Co. v. Mahoney, 82 Ill. 78, in which it was held in an action by a surgeon against a railroad company for treating an employee, the fact of the injury being proved, that it might be shown that the station agent notified the superintendent of the *fact* by telegram.

[33] Hamlin v. Atkinson, 6 Rand. (Va.) 574; Ashe v. De Rasset, 8 Jones (N. C.), L. 240.

[34] Hanson v. Armstrong, 22 Ill. 442. Before secondary evidence of the contents of a deed can be given, three facts must appear: 1st, the existence and genuineness of the original; 2d, its loss; and 3d, evidence that the paper offered is an examined or sworn copy. Oliver v. Parsons, 30 Ga. 391. But, as a deed is not a written evidence of the contract between the vendor and vendee, but rather a performance of the vendor's obligation under the contract, it may be shown by parol what the contract in fact was. Trayer v. Reeder, 45 Iowa, 272; Mason v. Buchanan, 62 Ala. 110.

[35] Calling v. Tremeck, 6 B. & C. 398; Brown v. Woodman, 6 C. & P. 206.

party only, each counterpart is alternately the best evidence as against the party sealing it, and those in privity with him,[36] and secondary evidence may be given as to the contents of the other part.[37] While, where the law requires that a certain writing shall be recorded, the record is the best evidence of the facts recited therein, yet, until it is recorded, the writing itself is admissible,[38] and this is also the case where the statute does not require that a writing shall be recorded, or where it is refused because of informalities. Thus the statute made no provision that the action of a school district upon the question of borrowing money should be recorded or that the record should be the only primary evidence on the question or its results, and it was held that there might be oral primary evidence thereon.[39] But where the statute requires that certain instruments or matters shall be recorded and provides that such records shall be evidence of the facts contained therein, parol evidence is not admissible to prove the facts stated in the record.[40]

The owner of goods destroyed by fire may be allowed to give to the jury an estimate of his total purchases since he occupied the location, and his annual sales from the same date. An owner of a stock of goods is often unable to produce the best and most correct evidence as to the value of the goods and he can only be required to prove their value by the best evidence obtainable.[41] On the question of the amount of grain a certain party has on hand, his books are the best evidence, and the testimony of an auditor of the opposite party employed to examine the books is incompetent without accounting for the absence of the books.[42]

The best evidence of the amount of real property in a taxing district may be the order of the board creating the district, and the best evidence of its assessment is the assessment roll of the district, and not the tax roll of the town in which the district lies.[43]

[36] Hall v. Ball, 3 M. & G. 42; Doe v. Ross, 7 M. & W. 102.

[37] Munn & Godbald, 3 Bing. 292.

[38] Randall v. Preston, 52 Vt. 198.

[39] Board of Education v. Loft, 7 Ill. App. 571.

[40] Beaudeau v. Cape Girardeau, 71 Mo. 392.

[41] Norfolk & W. Ry. Co. v. Briggs, 103 Va. 105, 48 S. E. 521.

[42] Bartlett v. Wheeler, 195 Ill. 445, 63 N. E. R. 169.

[43] Montpelier Savings Bank & Trust Co. v. School Dist. No. 5, 115 Wis. 622, 92 N. W. 439. The assessment roll in California when completed and certified by the assessor and the board of supervisors is the only evidence of his acts and intentions and so is the only evidence of the date of the assessment. Allen v. McKay & Co., 139 Cal. 72 Pac. 713, 94.

Evidence may be admitted against a party, though illegally taken from him. So evidence obtained through misuse of a search warrant, or the use of one illegally issued, is admissible against him from whom it is taken.[44]

Sec. 2. Rule as to merely Collateral Matters.

The rule, as stated in reference to the production of written communications or agreements, *has no application when they are merely collateral to the issue.* This is the case when parol evidence relates to matters distinct from a written contract or instrument, although the same fact could be proved or disproved by the writing.[1] Thus, while an action to recover for extra work done under a written contract, *and relating to the matters embraced in the contract*, cannot be maintained without the production of the written contract;[2] *yet if an entirely separate order is given for the extras,* then the production of the written contract is not necessary,[3] and parol evidence of the order and of the performance of the work is primary, because the ground of action does not rest upon the written contract, but upon the implied contract which arises from the order to perform the work. But to make parol evidence admissible in such cases, it must refer to a subject *distinct* from the written contract. Thus, payment of contracts, and of judments even, may be proved by parol, although there may be written or even record evidence of the fact.[4] So, too, the appointment of an agent may be shown by parol, even though his ap-

[44] Adams v. New York, 192 U. S. 585, 24 S. Ct. 372; Leggatt v. Tollervey, 14 East, 302; Commonwealth v. Tibbetts, 157 Mass. 519; Chastang v. State, 83 Ala. 29; State v. Flynn, 36 N. H. 64; State v. Pomeroy, 130 Mo. 489; Trask v. The People, 151 Ill. 523; *contra*, State v. Sheridan (Iowa), 96 N. W. 730; Blum v. State, 94 Md. 375; State v. Slamon, 73 Vt. 212, 50 A. 1097. See, also, Boyd v. United States, 116 U. S. 616.

[1] Shiels v. Stark, 14 Ga. 529.

[2] Buxton v. Cornish, 12 M. & W. 426; Vincent v. Cole, M. & M. 257.

[3] Reed v. Batte, M. & M. 84.

[4] Planters' Bank v. Borland, 5 Ala. 531; Kingsbury v. Moses, 45 N. H. 222; Keene v. Mead, 3 Pit. (U. S.) 7; Page v. Einstein, 7 Jones (N. C.) L. 147. *Such evidence is admissible to establish the fact of payment*, but not to show that a receipt was given, or that an indorsement of the amount was made upon a note or upon an execution. French v. Frazier, 7 J. J. Mar. (Ky.) 425. So the payment of taxes may be shown by parol, and the production of the record is not necessary. Davis v. Hare, 82 Ark. 386; Dennett v. Crocker, 8 Me. 239 Adams v. Beale, 19 Iowa, 61. Payment may be proved by parol to have been made in promissory notes, without the production of the notes. Daniels v. Johnson, 29 Ga. 207.

pointment is in writing;[5] but the extent of his powers, *as conferred by the written appointment,* can only be shown by the production of the writing itself;[6] although it may be shown by parol that he did certain acts as agent which were ratified by his principal, for the purpose of showing that he had authority to do a certain act as such agent.[7] Where the question is of the existence of a quarantine, it can be shown by the testimony of a witness who personally knew of its enforcement, without proof of the ordinance authorizing it.[8]

So the fact of birth, marriage, death or burial may be proved by parol, although a narrative or memorandum of the event has been entered in registers which the law requires to be kept.[9] The rule is, that where the narrative of an extrinsic fact has been committed to writing, the fact may nevertheless be proved by parol. Thus, the fact that a receipt for money has been given will not exclude parol proof of its payment.[10] So, where an oral and written notice to the same effect is served upon a party, the written notice need not be produced, unless the law makes a written notice imperative;[11] and the same is true where there is an oral admission of a debt and a written promise to pay.[12] Where there is a written demise, oral evidence of occupancy by the tenant, under the lease, may be given;[13] but the terms of the tenancy, as the amount of

[5] Whitfield v. Brand, 16 M. & W. 282.

[6] PARKE, B., in Whitfield v. Brand, *ante.*

[7] Concord v. Concord Bank, 16 N. H. 26.

[8] Mitchiner v. Western Union Telegraph Co. (S. C., 1905), 50 S. E. 190.

[9] Owings v. Wyant, 1 H. & McH. (Md.) 393; Com. v. Norcross, 9 Mass. 492; Evans v. Morgan, 2 C. & S. 453; Birt v. Barlow, 1 Doug. 172; Nixon v. Brown, 4 Blackf. (Ind.) 157; Morris v. Miller, 1 W. Bl. 632; St. Devereux v. Much Dew Church, 1 id. 367. The record or registry of a marriage is not the "best evidence" of it, but the marriage may be proved by testimony of parties present without production of the record. Rhode Island Hospital Trust Co. v. Thorndike, 24 R. I. 105, 52 A. 873, 876. The reason for this is, that the contents of the register is nothing more than a collateral or subsequent memorial of the fact, and forms no part of the fact to be proved, and, while it may be a convenient mode of proof, cannot exclude other evidence. Evans v. Morgan, *ante.*

[10] Rambert v. Cohen, 4 Esp. 213.

[11] Smith v. Young, 1 Camp. 439. And where the notice is merely collateral to the issue, it may be proved by parol, although it was given in writing. Polly v. McCall, 1 Ala. Sel. Cas. 246; see, also, Kelly v. Taylor, 23 Cal. 11. This rule rests upon the ground that there are two independent sources of evidence, and therefore that the party may resort to either; but it must be remembered that the rule only permits the party to show what the verbal notice was, and does not permit him to show what the written notice contained.

[12] Singleton v. Barrett, 2 C. & S. 369.

[13] Rex v. Holy Trinity, 7 B. & C. 611; Guitard v. Stoddard, 16 How. (U. S.) 494; Hammon v. Sexton, 69 Ind. 37.

rent, duration of the term, etc., can only be shown by the lease itself.[14] And the same is also true where proof is required to be made as to the person under whom the premises were occupied.[15]

As between third persons and the members of a firm, the fact of partnership may be established by parol, although there exists a deed of partnership.[16] So parol evidence is admissible to show that a person who took the acknowledgment of a deed of real estate, was at the time a justice of the peace, although the certificate does not state the fact,[17] and generally, parol proof is admissible to prove that a person has notoriously acted as a public officer, for the purpose of establishing his official character without producing his commission.[18] Parol evidence is admissible to show at what time a certain railroad train is due at a certain station, although the company has issued a printed time table fixing the time of arrival.[19] So, although a vessel was cleared at the custom house, and her clearance is in writing, parol evidence is admissible to show her destination.[20]

Sec. 3. Rules as to Things which cannot be produced in Court.

Inscriptions on monuments, tombstones, walls, surveyors' marks upon trees, or notices affixed to boards, and other *immovables* may be proved by parol.[1] This is upon the ground that the production of primary evidence is physically impossible, and as public convenience requires that such evidence should be received, and stands upon the same ground that copies of entries in the books of the Bank of England are admitted. The books of that bank being of great public concern to all of the national creditors, and as the removal of them would be so inconvenient, it was held by Lord

[14] Strother v. Bau, 5 Bing. 136; Rex. v. Merthyr-Tydvil, 1 B. & Ad. 29; Augustein v. Challis, 1 Exch. 279.

[15] Doe v. Harvey, 8 Bing. 289. But *contra*, see Augustein v. Challis, *ante*.

[16] Alderson v. Clay, 1 Starkie, 405.

[17] State v. McNally, 34 Me. 210; Rhoades v. Selin, 4 Wash. (U. S.) 715; Bank of U. S. v. Benning, 4 Cr. (U. S. C. C.) 81; Shults v. Moore, 1 McLean (U. S. C. C.), 520. See *post*, § 221.

[18] Jacobs v. United States, 1 Brock. (U. S. C. C.) 520.

[19] Chicago, &c., R. R. Co. v. George, 19 Ill. 510.

[20] Hadden v. People, 25 N. Y. 373.

[1] Bartholomew v. Stephens, 8 C. & P. 728; Rex v. Fursey, 6 id. 84; Coyle v. Cole, 6 C. & P. 357; Tracy Peerage Case, 10 Cl. & F. 164; Sayer v. Glossop, 2 Exch. 409 *n*; Mortimer v. M'Callan, 6 M. & W. 68; Senney v. Wade, 7 Sim. 595. It must be remembered, however, that in the case of notices so affixed to walls, etc., *it must appear that the document was affixed to the freehold and could not easily be removed*, and if it is shown

MANSFIELD[2] that copies of entries therein might be received, and that principle has been adopted in England in a variety of cases since without question.[3] But copies of the journals of the House of Commons were rejected by Lord MANSFIELD[4] upon the ground that no such inconvenience would attend their removal, and the same has been held in later cases.[5] The rule may be said to be that *where books, some of the contents of which it is desirable to prove, are of great public concern, and their removal would be productive of great public inconvenience,* copies of them may be received in evidence. This has been held in reference to the books of the Customs and Excise.[6]

Photographs may be admitted on proof of their correctness,[7] as,

to have merely been fixed to the wall of a building by a nail or other contrivance to hold it in place, notice to produce it must be given before secondary evidence of its contents can be received. Jones v. Tarleton, 9 M. & W. 675. The same rule applies to documents deposited in a foreign country when the laws or established usages of such country will not permit its removal, because in such cases, as in the case of mural inscriptions, etc., their production by the party is physically impossible. Alivon v. Furnival, 1 C., M. & R. 277. In the case of mural inscriptions, their value as evidence depends almost entirely upon the authority under which they were made, and the distance of time between their erection and the event they commemorate. Atheney Peerage, Pr. Min. 45. And the ease with which such evidence can be manufactured renders the strictest scrutiny necessary to prevent imposition.

[2] Rex. v. Gordon, Doug. 593 *n;* Lynch v. Clerk, 3 Salk. 154; Marsh v. Calnett, 2 Esp. 665. The same rule prevails as to the books of custom houses. Rex. v. King, 27 R. 234; Fuller v. Fitch, Carth. 346.

[3] Lord ABINGER, C. B., in Mortimer v. M'Callan, 6 M. & W. 67.

[4] In Rex v. Gordon, *ante.*

[5] See 29 St. Trials, 685, where *printed* copies of such journals were rejected.

[6] Rex. v. King, 2 T. R. 234; Fuller v. Fitch, Carth. 346. See, also, *post,* § 201, as to admissibility of certified copies of public documents. "It was formerly," says Lord ABINGER, C. B., in Mortimer v. M'Callan, 6 M. & W. 68, "the practice to produce them, but after some consideration it was thought that the public inconvenience was so great, that it has become every day's practice in this and other courts, to allow copies of those books to be received in evidence. *That goes upon the general principle of not removing books of general concernment.* Then does not that principle apply in all such cases? I think a case has been aptly put by my Brother ALDERSON, that if a writing were on a wall, might you not give evidence of the character of the handwriting, as probable evidence of who wrote it, without producing the wall in court? Suppose a man, instead of printing a libel in the usual way, were to write it on the dead walls of the metropolis, is it to be said that he cannot be punished because you cannot produce the wall in court? May you not, in such a case, prove his handwriting? Nor is this case altogether imaginary—I would mention a case which occurred very early in my professional life, where a man was convicted of writing a libel on the wall of the Liverpool jail. In that case the handwriting of the party was proved, and he was convicted." See, also, *post,* § 201, as to admissibility of certified copies of public documents.

[7] Martin v. Moore, 99 Md. 41, 57 A. 671.

for example, photographs of an injured party just before and just after an accident which is the foundation of suit.[8] So x-ray photographs are admissible on proper proof of their accuracy as showing things which cannot otherwise be presented to the court, although it is admitted they are not infallible.[9]

It is not essential to the admissiblity of a diagram, drawing or picture of a thing proper to be described to a jury, that it should have been prepared by the witness testifying. It is admissible after evidence that it is a correct representation of the thing sought to be described,[10] and even a rough sketch, though inaccurate, may be used in examination or argument as an illustration to aid the jury, but will not be admitted in evidence.[11] The results of experiments should not be admitted in evidence when made under conditions dissimilar to those of the matter in question, although under conditions more favorable to the party objecting to the experiments than were the conditions under which the matter in question took place.[12] Evidence of experiments as to the swinging of a scaffold which was not substantially in the same position as it was when the accident happened two years previously is clearly irrelevant.[13] Where one party, in cross-examination or otherwise, introduces part of a document in evidence, his opponent is entitled to have the whole put in.[14]

Sec. 4. When admissions of a party dispense with the rule.

In England, a tacit exception to the rule that oral testimony cannot be substituted for any writing, is made in favor of the

[8] Davis v. Seaboard A. L. Ry. Co., 136 N. C. 115, 48 S. E. 591.

[9] Miller v. Minturn (Ark.), 83 S.W. 918. An X-ray photograph may be proved by testimony of an expert that he took and developed the picture and that it was an accurate and correct representation. Chicago J. Electric Ry. Co. v. Spence, 213 Ill. 220, 72 N. E. 796. While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture taken by a camera can be, yet it should be admitted if properly taken. De Forge v. N. Y., etc., R. R., 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464; Bruce v Beall, 99 Tenn. 303, 41 S. W. 445. An X-ray photograph may be admissible in evidence without proof of the competency of the person taking it or the condition of the apparatus, if it is shown that it fairly represents the object photographed. Carlson v. Benton (Neb., 1902), 92 N. W. 600; *contra*, Bruce v. Beal (Tenn.), 41 S. W. 445.

[10] Koon v. Southern Ry., 69 S. C. 101, 48 S. E. 86.

[11] Lake Street El. R. Co. v. Burgess, 200 Ill. 628, 66 N. E. R. 215.

[12] Halverson v. Beattle Electric Co., 35 Wash. 600, 77 Pac. 1058, 1061. Experiments in running an electric car around a curve.

[13] Decatur Car Wheel & Manufacturing Co. v. Mehaffy, 128 Ala. 242, 29 So. 696.

[14] Phillips v. Town of Scales Mound, 195 Ill. 353, 63 N. E. R. 180.

parol admissions of a party to the record and of his acts amounting to admissions, and such admissions are received as primary evidence, although they relate to the contents of a deed or other instrument which are directly in issue,[1] and this is also the rule in Massachusetts.[2] But in New York it has been held, that the admissions of a party to the record can only be resorted to as evidence, where direct parol testimony of the facts thus sought to be proved, would be admissible, and consequently that they cannot be received for the purpose of proving matters of record, nor the contents of a written instrument, except in those cases where a ground has been laid for the reception of secondary evidence.[3] And although, in that State, the execution of a mere attested contract in writing may be proved in the first instance by such admissions,[4] yet such is not the case with regard to the execution of an instrument under seal, unless where a legal excuse has been given for the failure to produce the subscribing witness.[5] But on this point the law is the same in England, since, while it appears from the case cited[6] that admissions by a party to the record are there regarded as primary, and not as secondary evidence of the contents of a written instrument, it has, notwithstanding, been held that an acknowledgment under oath, by an answer in Chancery, will not suffice to prove the execution, without accounting for the absence of a witness by whom it has been attested.[7] It is, however, obvious that further proof may be waived, by an admission made for that purpose in court; and it has been held in Kentucky[8] that a party to an instrument might, in all cases, prove its execution by himself. In Illinois it is held that admissions of a defendant do not obviate the necessity of primary evidence of a written libel, and open the road to secondary evidence, where the libel is not produced or its absence accounted for.[9]

[1] Slatteree v. Pooley, 6 M. & W. 664; Newhall v. Holt, 6 id. 662.

[2] Loomis v. Woodham, 8 Gray (Mass.). 557; Smith v. Palmer, 6 Cush. (Mass.) 513.

[3] The Welland Canal Co. v. Hathaway, 8 Wend. (N. Y.) 480; Jenner v. Joliffe, 6 John. (N. Y.) 5; Hasbrouck v. Baker, 10 id. 248. See, also, Jamison v. Conway, 10 Ill. 227; Mason v. Park, 4 id. 522; Threadgill v. White, 11 Ired. (N. C.) 591.

[4] Hall v. Phelps, 2 John. (N. Y.) 451.

[5] Fox v. Kiel, 3 John. (N. Y.) 477; Henry v. Bishop, 2 Wend. (N. Y.) 575; Hollenbeck v. Fleming, 6 Hill (N. Y.) 306.

[6] Slatteree v. Pooley, *ante*.

[7] Call v. Dunning, 4 East, 53.

[8] Smith v. Maro, 7 J. J. Mar. 445.

[9] Prussing v. Jackson, 208 Ill. 85, 69 N. E. R., 771.

Sec. 5. Copies.

Copies of writings, however accurate, in the absence of a statute making them primary evidence, are merely secondary evidence, and are not admissible unless a proper ground for their admission as such has been laid,[10] and this rule applies when it becomes important to prove the contents of a manuscript which has been printed. The printed copy is not admissible unless a proper foundation for its admission has been laid;[11] so as to letter-press copies,[12] and to copies taken by a copying machine.[13] But when the foundation has been laid for the admission of a printed copy, all printed copies struck off in one common impression are admissible.[14]

Sec. 6. Secondary Evidence, what is; admissible when.

Secondary evidence is admitted in all cases where the principle which excludes it, to aid the supposed existence of better evidence behind, which it is within the power of the party to produce, does not apply; and the party desiring to make use of it, may prove that better evidence cannot be obtained by him.[1]

By the civil law, when documents or private writings had been lost by *inevitable accident,* any person having occasion to use them as evidence, was permitted to do so. The mere fact of loss, however, was not enough, it was also necessary to be shown that the loss was the result of an inevitable accident. "For instance," says Porthier, 781, "if in the case of a fire, or the pillage of my house, I had lost my papers, among which were the notes of my debtors, to whom I had lent money, or the acquittances for sums which

[10] Munson v. Blain, 15 Ind. 242; Lungsford v. Smith, 12 Gratt. (Va.) 554; Morrill v. Foster, 32 N. H. 358; Creed v. White, 11 Humph. (Tenn.) 549; Benton v. Craig, 2 Mo. 198; Chambers v. Hunt, 22 N. Y. L. 552; Marshall v. Harvey, 9 Gill (Md.) 251; Perkins v. Ermel, 2 Kan. 325; Redman v. Green, 3 Med. (N. C.) Ed. 54; Boynton v. Kees, 8 Pick. (Mass.) 329; Bowman v. Smith, 1 Strobh. (S. C.) 246; Carr v. Carr, 20 Mo. 408; Patton v. Rambo, 20 Ala. 485. See *post,* § , *Copies.*

[11] Rex v. Watson, 32 How. St. Tr. 82.

[12] Press copies of railroad way bills are not admissible to prove delivery of merchandise without showing the loss of the originals. Haas v. Chubb, 67 Kan. 787, 74 Pac. 230.

[13] Smith v. Moorehead Mfg. Co., 23 Minn. 141; Nodin v. Murray, 3 Camp. 228. Press copies of letters are admissible *against* a party if they purport to have been written by him, and are found in his possession, and appear to be in his handwriting, and the originals cannot be procured. Com. v. Jeffries, 7 Allen (Mass.), 548; see, also, Com. v. Eastman, 1 Cush. (Mass.) 189, where such evidence was admitted without objection. See *ante,* p. —.

[14] Rex v. Watson, *ante.*

[1] Rainy v. Bravo, L. R. 4 C. P. 287.

I had paid to my creditors; whatever the amount of such notes or acquittances might be, I ought to be allowed to give parol evidence of the sums which I had lent or paid, *because it is by an unforeseen accident,* and without my fault that I have lost the notes or acquittances, which would have furnished me with written evidence." By *our* law, however, parol proof of the contents of written instruments may be given upon proof of their loss, from whatever cause, whether inevitable accident or sheer carelessness, or the voluntary acts of the party, provided proof is first made that diligent, but unavailing, search has been made for them in the place where they would be most likely to be found, and the evidence of loss and search is such as to make it apparent that parol evidence is the best evidence in the party's possession, or in his power to produce.[2] The contents of a paper *voluntarily* destroyed by a party may, after proof of its destruction, be shown by parol;[3] *but he must repel every inference of a fraudulent design in its destruction,* or such evidence will be rejected,[4] when offered either by him or his privies.[5] When the loss of the original is established, its contents may be proved by the next best evidence attainable, and, if no better evidence exists, by parol.[6] So, too, when a written instrument that becomes material to be used in evidence is beyond the jurisdiction of the court, verbal evidence of its contents may be given.[7]

[2] Greeley v. Quimby, 22 N. H. 335; Williams v. Jones, 12 Ind. 561; Newsom v. Jackson, 26 Ga. 241; Morton v. White, 16 Me. 53; Conway v. State Bank, 13 Ark. 48; Mariner v. Saunders, 10 Ill. 113; Reddington v. Gilman, 1 Bosw. (N. Y.) 235; Holmes v. Marden, 12 Pick. (Mass.) 169; Sanders v. Sanders, 24 Ind. 133; Perkins v. Ernel, 2 Kan. 325; Chambers v. Hunt, 22 N. J. 552; Hussey v. Roquemore, 27 Ala. 281; Creed v. White, 11 Humph. (Tenn.) 549; Nicholson v. Hilliard, 2 Murph. (N. C.) 270; Waller v. School Dist., 22 Conn. 326; Steamboat v. Young, 3 Iowa, 268; State v. Gemmell, 1 Houst. (Del.) 9; Smith v. Steele, 1 H. & M. (Md.) 419; Flynn v. McGonnigle, 9 W. & S. (Penn.) 79; Tucker v. Bradley, 33 Vt. 324; Pool v. Myers, 21 Miss. 466; Bogart v. Green, 8 Mo. 115; Ord v. McKee, 5 Cal. 515; Diener v. Diener, 5 Wis.

[3] People v. Dennis, 4 Mich. 609; Riggs v. Taylor, 9 Wheat. (U. S.) 483; Orne v. Cook, 31 Ill. 238; Adams v. Guice, 30 Miss. 397; Downey v. Logan, 12 B. Mon. (Ky.) 386.

[4] Joannes v. Bennett, 5 Allen (Mass.), 169; Blake v. Fash, 44 Ill. 302. When a party destroys an instrument at a time when none of the parties had reason to think it necessary to preserve it and there is no suspicion of fraud, secondary evidence of the instrument is admissible. Davis v. Teachout, 126 Mich. 135, 85 N. W. 475, 86 Am. St. Rep. 531.

[5] Both the grantee and those claiming under him are estopped to put in secondary evidence of a deed voluntarily destroyed by him. Potter v. Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478.

[6] Granger v. Warrington, 8 Ill. 299; Cotton v. Campbell, 3 Te. 493; Greeley v. Quimby, *ante;* Newsom v. Jackson, *ante.*

[7] Forrest v. Forrest, 6 Duer (N. Y.), 102; Ralph v. Brown, 3 W. & S.

If the paper writing is one which the party himself should have in his possession, before he can be permitted to put in secondary evidence of its contents, he must prove either its loss or destruction, or its non-production must be satisfactorily accounted for.[8] With respect to paper writings, proof of their contents may be made by secondary evidence: 1st, *Where the original writing is beyond the jurisdiction of the court,*[9] *or is lost or destroyed;*[10] 2d, *Where its production is physically impossible, or highly inconvenient;*[11] 3d, *Where it is in the hands of the opposite party, who, upon proper notice, refuses or neglects to produce it;*[12] 4th, *Where it is in the possession of a third person, who is not compellable by law to produce it and he, being called as a witness with subpœna duces tecum, relies upon his right to withhold it;*[13] 5th, *Where there is a strong presumption of law in favor of the existence of the fact which the writing could be used to sustain;*[14] 6th, *Where the*

(Penn.) 395; Shorter v. Shepard, 33 Ala. 648; Blanchard v. Young, 11 Cush. (Mass.) 341; Denten v. Hill, 4 Hayw. (Tenn.) 84.

[8] Post v. Leland, 184 Mass. 601, 69 N. E. 361; Wilson v. Young, 2 Cr. (U. S. C. C.) 33; Felton v. McDonald, 4 D. & B. (N. C.) L. 406; Conway v. State Bank, 4 Ark. 48.

[9] Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595. Proof that a document involved in a case is in the possession of some one outside the jurisdiction is not of itself sufficient to authorize the introduction of parol evidence as to it. If the document is in the hands of a party to the suit he should be given notice to produce it, and if in the hands of another, his deposition should be taken or some proper attempt made to obtain it. Wiseman v. Northern Pacific Ry. Co., 20 Ore. 425, 26 P. 272, 23 Am. St. Rep. 135; Turner v. Yates, 16 How. 14; *contra*, Gordon v. Searing, 8 Cal. 49; Beattie v. Hilliard, 55 N. H. 428; Brown v. Wood, 19 Mo. 475; Shepard v. Giddings, 22 Conn. 482; Ralph v. Brown, 3 Watts & S. 395; Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

[10] Rex v. Johnson, 7 East, 66; Pendney v. Crescent Life Ins. Co., 21 La. An. 410; Halderman v. Halderman, 1 Hemp. (Tenn.) 559.

[11] Tracy's Peerage Case, 10 Cl. & F. 164; Mortimer v. McCallum, 6 M. & W. 68. See *ante*, § 3.

[12] United States v. Winchester, 2 McLean (U. S. C. C.) 135; Potier v. Barclay, 15 Ala. 439; Guines v. Fall, 15 Cal. 63; Bank of South Carolina v. Brown, Dudley (Ga.), 62; Jefferson v. Conaway, 5 Harr. (Del.) 16; State v. Lockwood, 5 Blackf. (Ind.) 145; Anderson Bridge Co. v. Applegate, 13 Ind. 339; Patterson v. Linden, 14 Iowa, 414; Dupey v. Ashby, 2 A. K. Mar. (Ky.) 11; Williams v. Benton, 12 La. An. 91; Kennedy v. Fowke, 5 H. & J. (Md.) 63; Robertson v. Parks, 3 Md. Ch. 65; Commonwealth v. Emery, 2 Gray (Mass.), 80; Browne v. Boston, id. 494; Lewire v. Dille, 17 Mo. 64; Farmers and Mechanics' Bank v. Lunergon, 21 Mo. 46; Ford v. Munson, 4 N. J. L. 93; Rogers v. Van Hoeson, 12 Johns. (N. Y.) 220; Weeks v. Lyon, 18 Barb. (N. Y.) 530; Milliken v. Barr, 7 Penn. St. 23; Carland v. Cunningham, 37 id. 228; Kimble v. Joslin, 1 Overt. (Tenn.) 380; Farnsworth v. Sharp, 5 Sneed (Tenn.), 615; Dean v. Berder, 15 Tex. 298.

[13] Mills v. Oddy, 6 C. & P. 728; Marston v. Downes, 1 Ad. & El. 31; Doe v. Ross, 7 M. & W. 102.

[14] This rule applies in those cases where it is desirable to prove the appointments of public officers. The law raises a strong presumption from the

papers are voluminous, and it is only necessary to prove their general results;[15] *and,* 7th, *Where the question arises on the examination of a witness on the voir dire.*[16]

Evidence is admissible of one who has searched the records and failed to find there certain entries or documents. It is said that at common law the fact that a specific document or entry did not exist in public records might be proven by the testimony of anyone who had made a search of the records for the purpose. This was not confined to the custodian.[17]

Sec. 7. Loss of Paper, how established.

In order to bring a case within the first rule stated *supra,* the burden is upon the party seeking to make use of secondary evidence to establish either that the paper is beyond the jurisdiction of the court[1] or that

undisturbed exercise of a public office, that the appointment is valid, and, therefore, it is not generally necessary to produce the written appointment of public officers, *but it is sufficient to show that they acted as such.* Allen v. McNeel, 1 Mill (S. C.) Const. 459; Brewster v. Sewell, 3 Br. Ala. 302; Bunbury v. Matthews, 1 C. & K. 382; Rex v. Verlst, 4 Camp. 432; Berryman v. Wise, 4 T. R. 366; Rex v. Howard, 1 M. & Rob. 187. See *post,* § , *Presumptions.*

[15] Where an account book contains complicated or voluminous accounts or transactions, the examination of which could not conveniently take place in court, an accountant who has made an examination of the book may state the result of his computation, but where the items in issue are simple in nature the book itself is the best and only evidence admissible. Mendel v. Boyd (Neb., 1904), 99 N. W. 493; Roberts v. Doxon, Peake, 83; Meyer v. Lefton, 2 Starkie, 274.

[16] Butchers' Co. v. Jones, 1 Esp. 160; Miller v. Mariners' Church, 7 Me. 51; Rex v. Gesburn, 15 East, 57; Sewell v. Stubbs, 1 C. & P. 74; Botham v. Swingler, 1 Esp. 164; Carlisle v. Eady, 1 C. & P. 234.

[17] State v. Rosenthal (Wis., 1905), 102 N. W. 49; McPhelemy v. McPhelemy (Conn., 1905), 61 A. 477; Vizard v. Moody, 119 Ga. 918, 43 S.E. 426; Greenfield v. McIntire, 112 Ga. 691, 38 S. E. 44; Hines v. Johnston, 95 Ga. 629, 23 S. E. 470. In North Dakota it is held that proof of the absence of a record entry or document should be furnished by introducing the record itself or by the oral testimony of the custodian. Where the records are so voluminous that oral testimony is admissible to show the absence of any particular record or entry, it must ordinarily be given by the custodian or keeper of the records and not by a stranger; and then only when a diligent examination is shown to have been made. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844, 852; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132, 136.

[1] Sunday v. Thomas, 26 Ga. 537; Shorter v. Sheppard, 33 Ala. 648; Ralph v. Brown, 3 W. & S. (Penn.) 395; Burnham v. Wood, 8 N. H. 334; Waller v. Cralle, 8 B. Mon. (Ky.) 11; Forrest v. Forrest, 6 Duer (N. Y.), 102; Schaeffer v. Georgia R. R. Co., 66 Ga. 39; Brown v. Wood, 19 Mo. 475; Underwood v. Lane, 1 Dev. (N. C.) D. 173. Evidence that the recipient of a letter lived out of the State and had died was held sufficient basis for the introduction of a letter press copy of it. Hirsch v. C. W. Leatherbee Lumber Co., 69 N. J. 509,

it is lost or destroyed.[2] Not only must the party prove that such a paper once existed,[3] and also its due execution,[4] genuineness,[5] and its loss or destruction,[6] without culpability

55 A. 645, 647. In Topping v. Bickford, 4 Allen (Mass.), 120, it was held that where the books of a foreign corporation are in another State, a party is not bound to produce them, and that depositions of its late officers were admissible, although, in reply to cross-interrogatories requesting them to do so, they did not annex the records of the company, or copies of them, if they were not in their custody. In a later case—Binney v. Russell, 109 Mass. 55, where a witness whose deposition was taken out of the State refused to annex an original document in his possession to his deposition, but did annex a copy of it, which he swore to be correct, it was held that the copy was inadmissible. See, also, Amherst Bank v. Conkey, 4 Met. (Mass.) 459. Where a corporation may not be compelled to surrender its private papers, an officer whose deposition is taken may annex to the deposition a certified copy of an original paper. Spencer v. Phoenix Mut. Life Ins. Co., 119 Wis. 530, 97 N. W. 207.

[2] Emery v. Vinall, 26 Me. 295; Patton v. Rambo, 20 Ala. 485; Sims v. Sims, 5 Humph. (Tenn.) 370; Morrison v. Welty, 18 Md. 169; Manson v. Blair, 15 Ind. 242; Ohio Ins. C. v. Nunemacher, 10 id. 234; Perkins v. Ermel, 2 Kan. 325; Hughes v. Easten, 4 J. J. Mar. (Ky.) 572; Marshall v. Harvy, 9 Gill (Md.), 251; Dunnock v. Dunnock, 3 Md. Ch. 140; Boynton v. Rees, 8 Pick. (Mass.) 329; Benton v. Craig, 2 Mo. 198; Morrill v. Foster, 32 N. H. 358; Bozorth v. Davidson, 3 N. J. L. (2 Penn.) 617; Chambers v. Hunt, 22 N. J. L. 552; Redman v. Green, 3 Ired. (N. C.) Eq. 54; Bowman v. Smith, 1 Strobh. (S. C.) 246; Moury v. Schroder, 4 id. 69; Creed v. White, 11 Humph. (Tenn.) 549; Langsford v. Smith, 12 Gratt. (Va.) 554; Ransdale v. Grove, 4 McLean (U. S. C. C.), 282; Lewis v. Baird, 3 id. 56; Reynolds v. Quattlebaune, 2 Rich. (S. C.) 140; Hussey v. Roquemore, 27 Ala. 281; Thalick v. Presley, 29 id. 427; Griffith v. Huston, 7 J. J. Mar. (Ky.) 385; Spence v. Spence, 2 Brev. (S. C.) 466; Gillespie v. Tucker, id. 433; United States v. Porter, 3 Day (Conn.), 283; Norris v. Russell, 5 Cal. 249; Morgan v. Jones, 24 Ga. 155; Sloo v. Roberts, 7 Ind. 128.

[3] Thompson v. Thompson, 9 Ind. 323; Lamerson v. Hoffman, 24 N. J. L. 674; Culpepper v. Wheeler, 2 McMull (S. C.), 66; Dean v. Pond, 1 N. J. L. 379; Hewes v. Wiswell, 8 Me. 94; Weatherhead v. Baskerville, 11 How. (U. S.) 329; Hanna v. Price, 23 Ala. 826; Swift v. Fitzhugh, 9 Port. (Ala.) 39; Downing v. Pickering, 15 N. H. 344; Stockdale v. Young, 3 Strobh. (S. C.) 501 *n;* Baskin v. Seechrist, 6 Penn. St. 154; Jackson v. Woolsey, 11 Johns. (N. Y.) 446.

[4] Jack v. Woods, 29 Penn. St. 375; Atwell v. Lynch, 39 Mo. 519; Perry v. Roberts, 17 id. 36; Embury v. Millar, 1 A. K. Mar. (Ky.) 300; Kimball v. Morrell, 4 Me. 368; Goodier v. Lake, 1 Atk. 446; Doe v. Whitefoot, 8 C. & P. 270; Jackson v. Frier, 16 Johns. (N.Y.) 196; Rex. v. Culpepper, Skin. 673. If the paper was an attested instrument, the attesting witness should be called, or, in the event of his death, or his whereabouts are unknown, his handwriting should be proved precisely in the same way as if the deed or instrument had been produced. But if it cannot be ascertained where the attesting witness was, this strictness of proof will not be required. Taylor on Ev. § 316.

[5] Helton v. Asher, 103 Ky. 730, 46 S. W. 22, 82 Am. St. Rep. 601; Reynolds v. Jourdan, 6 Cal. 108; Stowe v. Thomas, 12 Penn. St. 209; McPherson v. Rathbone, 7 Wend. (N. Y.) 216. The former existence and contents of a lost deed may be proved by circumstantial evidence, as by references to it in other deeds. Bright v. Allan, 203 Penn. 386, 394, 53 A. 248, 250.

[6] Helton v. Asher, 103 Ky. 730, 46 S. W. 22, 82 Am. St. Rep. 601; Eakin v. Vance, 18 Miss. 149; Morrill v.

on his part,[7] but he must also repel every inference of fraudulent intent in its destruction, or such evidence will be rejected.[8] He must prove its destruction positively, or presumptively by showing that it has been thrown aside as useless,[9] or that its destruction was the result of accident, or was without the agency or consent of the party who seeks to show its contents. The object of the rule which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes. Therefore, when it appears that the best evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. But if the destruction was made upon an erroneous impression of

Foster, 32 N. H. 358; Carr v. Carr, 36 Mo. 408; Thalick v. Pressly, 29 Ala. 427. Or the absence of the writing must be accounted for in a satisfactory manner. Wiswall v. Knevals, 18 Ala. 65; Baldwin v. Massie, 7 Wheat. 122; Bigelow v. Young, 30 Ga. 121; Durham v. Holeman, id. 19; Dermont v. McKracken, 6 Blackf. (Ind.) 356; Perkins v. Bard, 16 La. An. 443; Marks v. Winter, 19 id. 445; Young v. Mackall, 3 Md. Ch. 398; Doe v. McCaleb, 3 Miss. 756; Brighton, &c., Bank v. Philbrick, 40 N. H. 506; Sterling v. Potts, 5 N. J. L. 773; Cary v. Campbell, 10 John. (N. Y.) 363; Dumas v. Powell, 3 Dev. (N. C.) L. 103; Thompson v. Applewhite, 1 Dev. (N. C.) Eq. 460; Caufman v. Congregation, 6 Binn. (Penn.) 59; Dawson v. Graves, 4 Call (Va.), 127; Brackett v. Evans, 1 Cush. (Mass.) 79.

[7] Winona v. Hoff, 11 Minn. 119. Even where a paper is voluntarily destroyed by a party, he may, after proof of its destruction, give secondary evidence of its contents. People v. Dennis, 4 Mich. 609; Downy v. Logan, 12 B. Mon. (Ky.) 386; Riggs v. Taylor, 9 Wheat. (U. S.) 483; Adams v. Guice, 30 Miss. 397; Orne v. Cook, 31 Ill. 233.

[8] Joannes v. Bennett, 5 Allen (Mass.), 169; Blake v. Frost, 44 Ill. 102. It is for the court to determine whether the paper was destroyed with a fraudulent intent. Smith v. Holyoke, 112 Mass. 517; Randolph v. Lane, 57 Ind. 115; Renna v. Bank of Columbia, 9 Wheat. (U. S.) 581.

[9] Davis v. Teachout, 126 Mich. 135; 85 N. W. 475, 86 Am. St. Rep. 531; Rex v. Johnston, 7 East, 69. In this case the publisher of a paper, in which a libel had appeared, stated that he believed the original was either destroyed or lost, having been thrown aside as useless. It was held sufficient to let in proof of loss. See, also, Kensington v. Ingles, 8 East, 278; see, also, Smith v. Holyoke, 112 Mass. 517, where in an action the contents of certain letters written to her as the defendant became important as proof, and the plaintiff having sworn that she having no further use for them had destroyed them, the court held that the reason given justified the judge in holding that they were not destroyed with a fraudulent intent.

its effect, secondary evidence is admissible. The motive is the controlling fact.[10]

Thus, parol evidence was offered to prove that the plaintiff executed a discharge of the defendant from a certain claim, and tendered it to him in the court room, by putting it in his lap, and that he brushed it, or it fell, upon the floor, and was not afterwards seen. It was held that such evidence was admissible, the instrument, under such circumstances, being considered a lost paper.[11]

Where the loss or destruction of the paper is probable, very slight evidence of its loss or destruction will be required, *and a useless paper* will be presumed to have been destroyed.[12]

The sufficiency of evidence to prove the loss of a written document depends on the facts of each particular case and lies largely within the discretion of the trial judge. There is no arbitrary rule disentitling any one except the party entitled to the custody of the paper from testifying as to its loss.[13]

Sec. 8. Search, Sufficiency of.

Where the paper writing sought to be established by secondary evidence should be in the custody of the party seeking to show its contents, or in the custody of some person not a party to the suit, within the jurisdiction of the court, such evidence is not admissible unless the party satisfies the court that he has used due diligence, and has been unable to find it.[1] He must establish its loss by proof that he has made diligent but unavailing search for the paper in places where it would be most likely to be found, and the *degree* of diligence necessary to be shown must necessarily depend upon

[10] Bagley v. McMickle, 9 Cal. 430; see, also, Rex v. Johnston, *ante*.

[11] Stoddard v. Mix, 14 Conn. 12.

[12] Where a card is shown to have been tacked to a railroad tie, very slight evidence of its loss is a sufficient foundation for secondary evidence of its contents, and the very statement of the circumstances of its finding may be sufficient where it was not intended to be preserved. Atchinson, T. & S. F. R. Co. v. Palmore, 68 Kan. 545, 75 Pac. 509; Rex v. E. Farleigh, 6 D. & R. 153; Freeman v. Arkell, 2 B. & C. 496. The admission of the defendant that he destroyed the paper, is sufficient. Rhode v. McLean, 101 Ill. 467.

[13] Liles v. Liles, 183 Mo. 326, 81 S. W. 1101.

[1] Davis v. Spooner, 3 Pick. (Mass.) 284; Poignand v. Smith, 8 id. 272. The burden of showing the loss of a written instrument is upon the party seeking to introduce secondary evidence, and no instrument can be said to be lost until a careful search has been made for it. Hansen v. American Ins. Co., 57 Iowa, 741. In the case of judgment rolls and other documents required to be kept in the custody of certain officers, if they cannot be found in the proper place, the presumption is that they are lost or destroyed. Mandeville v. Reynolds, 68 N. Y. 528.

the value and importance of the lost document and the circumstances of each case.[2]

The object of the proof is merely to establish a presumption of the loss of the paper, therefore the party is not generally required to show that he has made such a search as would be made for stolen goods, nor be in a position to negative every possibility of its having been kept back, but it is sufficient if he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest.[3]

[2] Wiseman v. Northern Pacific R. Co., 20 Ore. 425, 26 P. 272, 23 Am. St. Rep. 135; Spalding v. Bank of Susquehanna Co., 9 Penn. St. 28; Witter v. Latham, 12 Conn. 399; Gully v. Bishop of Exeter, 4 Bing. 298. Where the party who had the custody of the paper swears that he has searched "everywhere where it could be expected to be found" Pierce v. Wallace, 18 Cal. 165, or that "it is not in his possession or control" Prettyman v. Wallace, 34 Ill. 175, or "it is lost, I cannot tell what has become of it" Voorhees v. Dorr, 51 Barb. (N. Y.) 580, this has been held sufficient. Drake v. Rainey, 3 Rich. (S. C.) 37; Poe v. Darrah, 20 Ala. 288; Braintree v. Battles, 6 Vt. 395; Graff v. Pittsburgh R. R. Co., 31 Penn. St. 487. Proof by the grantee in a deed that he deposited it in the post-office directed to another, who testifies that he never received it, and that inquiry has been made at the office of deposit and delivery, and to the general post-office, by letter, without finding the deed, has been held sufficient. M'Rae v. Pegues, 4 Ala. 158. So where the plaintiff testified that he deposited a postal card in the post-office, and the defendant never received it, it was held to constitute a sufficient ground for letting in secondary evidence of its contents without any search for it. Vancil v. Hagler, 27 Kan. 407. What will constitute due diligence in the search for public records and documents, so as to admit secondary evidence in proof of their contents, will depend upon the circumstances of each particular case. Thus where more than 20 years have elapsed since the sale, and the register of probate testifies that he had made search of the records in the case of N. S.; that he found but part of the papers in that case; that he found the files in very bad condition, and some of them broken open and loose; and that he examined the index of the records for the year or two spoken of, without finding the papers desired or reference to the record thereof in the index, the court will admit parol evidence to show the contents of such papers, especially when the transaction occurred many years before. Simpson v. Norton, 45 Me. 281. In Brewster v. Sewell, 3 B. & Ald. 303, ABBOTT, C. J., said: "When the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient;" and BEST, J., said: "If a paper be of considerable value, or if there be reason to suspect that the party not producing it has a strong interest which would induce him to withhold it, a very strict examination would probably be required; but if a paper be utterly useless, and the party could not have any interest in keeping it back, a much less strict search would be necessary to let in parol evidence."

[3] Folsom v. Scott, 6 Cal. 460; M'Gahey v. Alston, 2 M. & W. 214; Hatch v. Carpenter, 9 Gray (Mass.), 271; Atherton v. Phœnix Ins. Co., 109 Mass. 32; Tillotson v. Warner, 3 Gray (Mass.), 574.

The general rule concerning proof of a lost instrument is that reasonable search shall be made for it in the place where it was last known to have been, and, if such search does not discover it, then inquiry should

If the instrument was an indenture, interchangeably signed and sealed, or if it was executed in duplicate, and the part belonging to the party seeking to use it, is lost, due diligence must be shown to ascertain whether any counterpart exists, and if so, to obtain it

be made of persons most likely to have its custody, or who have some reason to know of its whereabouts. The party must show that he has in good faith, and to a reasonable degree, made an effort to discover the instrument, and to that end has exhausted all sources of information and means of discovery which were open to him, and which, in the nature of the case, were possible. No fixed rule as to the necessary proof to establish loss, or what constitutes reasonable search, can be formulated. The terms "reasonable search" and "in good faith," applied to proof of lost instruments, must be construed and defined under the facts in each particular case. There is no inflexible definition under which they can be applied to all cases. The sole object of such proof is to raise a reasonable presumption, merely, that the instrument is lost; and this is a preliminary inquiry addressed to the discretion of the judge. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803. The purposes for which it is proposed to use it on the trial will also have an important bearing in determining the degree of diligence required. If the cause of action or defense is founded on the supposed writing, the party offering the evidence will be required to show a greater degree of diligence in the attempt to produce the original than if it is desired to be used as evidence in some collateral matter. The proof of search and proof of loss required is always proportionate to the character and value of the paper supposed to be lost. Wiseman v. Northern Pacific R. Co., 20 Ore. 425, 26 P. 272, 23 Am. St. Rep. 135; American Life Ins. Co. v. Rosenagle, 77 Pa. St. 507.

It may be stated as a general rule that a party is not allowed to produce secondary evidence *until a bona fide and diligent search has been unsuccessfully made for the lost instrument, in the place where it was most likely to be found.* Meek v. Spencer, 8 Ind. 118; S. P. Cook v. Hunt, 24 Ill. 535; Holbrook v. School Trustees, 28 Ill. 187; Dickerson v. Talbot, 14 B. Mon. (Ky.) 60; Sellers v. Carpenter, 33 Me. 485; Kidder v. Blaisdall, 45 Me. 461; Murray v. Buchanan, 7 Blackf. (Ind.) 549; Mullikin v. Boyce, 1 Gill (Md.), 60; Glenn v. Rogers, 3 Md. 312; Doe v. McCaleb, 3 Miss. 756; Barton v. Munian, 27 Mo. 235; Jackson v. Hasbrouck, 12 Johns. (N. Y.) 192; Jackson v. Frier, 16 id. 192; Jackson v. Root, 18 id. 60; Poignand v. Smith, 8 Pick. (Mass.) 272; Dan v. Brown, 4 Cow. (N. Y.) 483; Jackson v. Betts, 6 id. 377; 9 id. 208; Dreisbach v. Birger, 6 Watts & S. (Penn.) 564; Park v. Bird, 3 Pa. St. 360; Vaulx v. Merriwether, 2 Sneed (Tenn.), 683; Wade v. Work, 13 Tex. 482; Royalton v. Turnpike Co., 14 Vt. 311; Fletcher v. Jackson, 23 Vt. 581.

Where an insurance policy is shown to be in the hands of its agent his testimony that he did not know where the policy was and that he could not find it is not sufficient showing for the introduction of secondary evidence of its contents where he did not show where he looked for the policy nor what was the character of the search he made. Phœnix Assurance Co. of London v. McAuthor, 116 Ala. 659, 22 So. 903, 67 Am. St. Rep. 154.

Testimony "I received a letter from Humphrey, which is lost. I cannot find it." is insufficient to predicate the admission of secondary evidence, as it does not show that due diligence was used in the search for the lost paper. It is the duty of the judge to decide questions as to the existence of facts rendering secondary evidence admissible unless in deciding such a question the judge were in effect deciding the very matter in issue, but the question is to be decided, not according to his discretion, but according to law. Avery v. Stewart, 134 N. C. 287, 46 S. E. 519. The following testimony of an attorney was held sufficient to warrant the

to be used upon the trial.[4] All the proper sources from which primary evidence can be secured must be first exhausted,[5] and if

introduction of secondary evidence of the contents of a letter sent to him by his client in the previous case: "I do not know where that letter is. I have searched twice during the past week for it among my papers at my office and other places where I keep my papers, but have not been able to find it. My impression is, that the letter lay upon my table till after I had seen the plaintiff at that trial, and then went into the waste basket." On cross-examination he testified: "I did not look through *all* my files of letters and papers, for when I came across a file marked as of a previous year, I did not search through it; I did not examine the papers I looked over, one by one, and there were places containing papers (but not private papers) that I did not examine." Hatch v. Carpenter, 9 Gray (Mass.), 271.

[4] Poignand v. Smith, 8 Pick. (Mass.) 272; Rex v. Castleton, 6 T. R. 206; Mann v. Godbald, 3 Bing. 292.

[5] Rex v. Stokes, 1 B. & Ald. 373; Hemphill v. McClimans, 24 Penn. St. 367; Graff v. Pittsburgh R. R. Co., 31 id. 489; Rush v. Whitney, 4 Mich. 495; Drake v. Rainey, 3 Rich. (S. C.) 37; Leland v. Cameron, 31 N. Y. 115. The deputy clerk of a court testified that he had diligently searched for a certain bill and answer in their proper place, could not find them, and did not believe they were in the office, and showed a receipt for them given by S., a former attorney for the party against whom they were sought to be given in evidence. S. swore he had delivered them to G., his successor in the case now on trial, and had just searched for them in his own office and could not find them. G. swore he had never seen or had them. It was held that this was a sufficient foundation for the introduction of secondary evidence of their contents. Carr v. Miner, 42 Ill. 179. So the destruction of the dwelling house of a party by fire raises such a presumption of the loss of papers as to let in parol evidence of their contents. Harrison v. Long, 4 Desau. (S. C.) 110. But in such a case if any papers are saved, it must appear that they were also examined, for the paper in question might be one of those saved. Folsom v. Scott, 6 Cal. 460. Where proof was made to the court that the executor of the grantee had searched for an original deed and had not been able to find it; that after the grantee's death his son had carried off to a place in the country a trunk containing his father's papers, which the executor had not searched, but he had made verbal application to him for the trunk and the deed, it was held that a copy was not admissible because the paper might be in the trunk, which was not examined, and no step had been taken to bring the executor into court with a subpœna *duces tecum*. Tannis v. St. Cyre, 21 Ala. 449. So where a bond given to secure the claims of A. and divers others, was traced into the hands of A., and A. subsequently assigned all his claims and demands to B. and C., and search was made for the bond among the papers of B. only, it was held not to be such evidence of the loss of the bond and a diligent search for it as to justify the admission of secondary evidence of its contents. Kimball v. Bellows, 13 N. H. 58. So where a subpœna *duces tecum* was served three or four days before the trial, on a lessee, requiring him to produce his lease, and he was sworn as a witness, and stated that he had not had time to search all his papers to find the lease, but that he had made some search in the most probable places; that he might have destroyed it, but he did not recollect to have done so; that he had not seen it for a year, etc., it was held that the loss of the lease was not sufficiently proved to authorize the admission of parol evidence of its contents. McNeely v. Rucker, 6 Blackf. (Ind.) 391. In Hogsett v. Ellis, 17 Mich. 351, it was held erroneous to allow a party claiming land under an execution sale to give parol evidence of the affidavit and bond required to give the court jurisdiction, and other papers filed in the case, after merely showing by the

there are several places of deposit, all should be searched.[6] If the instrument ought to have been deposited in a public office, or filed in a certain place in the usual course of business, it will generally be sufficient to search for it there.[7] But where it may be in either

justice who rendered the judgment that he delivered the docket, and, he believed, the files also, to his successor; that he had looked for the files and could not find them, and by his successor that he was very certain he had not received the files, but that he had not searched for them.

[6] Richards v. Lewis, 11 C. B. 1035; Rex v. Morton, 4 M. & S. 48. But where the paper was last seen in the possession of a person who lives in another State, and a diligent search has been made for it in the place where it ought to be if in the State, secondary evidence of its contents is admissible. Clifton v. Lilley, 12 Tex. 130.

[7] Rex v. Stourbridge, 8 B. & C. 96; M'Gahey v. Alston, 2 M. & W. 206; Farnley v. Worthington, 1 M. & G. 491.

Search for a lost deed may be sufficient to authorize secondary proof of its contents where search was made in the last known place of its deposit and inquiry was made of the only persons who had access to it. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803.

As a general rule, if the loss of a paper is relied on to account for its non-production, the fact of loss is not established without proof of diligent search where the paper is most likely to be found, and the particular character of the search must be shown. Where it appears that its custodian was not the party seeking its probate, but was a third person, who cannot be compelled to produce the paper, the rule will be relaxed as to diligence of search; but enough should be shown to reasonably satisfy the court that the paper is not voluntarily withheld by the party offering to prove it. Laster v. Blackwell, 128 Ala. 143, 30 So. 663.

If a defendant, when applied to for a deed, denies having it in his possession, and expresses his belief that it is in the register's office, where an ineffectual search is made for it, and also in the office of a lawyer, who once had it in his possession, a sufficient predicate is laid for proof of the deed by a certified copy, and no notice to the party, to produce the deed, is necessary. Shields v. Boyd, 15 Ala. 818. To authorize secondary evidence of the contents of an execution, issued by a justice of the peace, it is sufficient to show, by the justice, that he cannot, after diligent search, find it in his office, and has not seen it since the last term of the circuit court, when it went before the jury as evidence in another cause, accompanied by the testimony of the circuit clerk that he has made diligent but unsuccessful search for it among the files of his office containing the trial papers of the last term. Johnson v. Powell, 30 Ala. 113.

In Vermont the court will not presume that a deed of lands has been recorded, or require the party to search the records, before resorting to oral evidence of the contents of the deed. If the opposite party, in whose possession the deed is presumed to be, is out of the State, notice to his counsel to produce the original is sufficient to warrant the introduction of secondary evidence of its contents. Mattacks v. Stearns, 9 Vt. 326.

It is sufficient to show loss of tickets that they were turned over to a railway superintendent, where its general passenger agent testified that the accounting department of the company had not been able to find them and that it was supposed they had been destroyed. Chiles v. Southern Ry., 69 S. C. 327, 48 S. E. 252.

In Beall v. Dearing, 7 Ala. 124, it was held that an unsuccessful attempt to take the deposition of a nonresident, in whose possession a deed was last known to be, to establish its existence, contents, and loss, is equivalent to a demand of the deed, and that where it was of ancient date, and as such would not probably be preserved a great length of time, as a bill of sale of slaves, such an attempt, and inquiry of persons who

of two or more places, all the places should be searched, and if it may be in the custody of either of two or more persons, inquiry should be made of all of them.[8] If the person entitled to the custody of the paper is dead, inquiries should be made of his personal representatives, and if it relates to his real estate, of his heirs also.[9] The person in whose possession a written instrument was last traced must be produced unless this is shown to be impossible, in which case search among his papers must be proved, if that can be made. Search must be made with the utmost good faith and be as thorough and vigilant as if the rule were that all benefit of the paper would be lost unless it be found.[10] It is not necessary that the search should have been recent, if, at the time when it was made, it was thorough and diligent, and, in one case,[11] it was held sufficient, although made three years before, although the court said it would have been more satisfactory if the papers had been again examined; and in a Pennsylvania case[12] it was held that a search made *more* than one year before the trial is not sufficient.

Sec. 9. Requisites of Notice to Produce Paper in Possession of the Adverse Party.

When any written instrument is in the possession or under the control of the adverse party, secondary evidence cannot be given of its contents, unless a reasonable notice is served upon him, or his attorney, to produce it,[1] and the party neglects or refuses to do so.[2]

were supposed to know of it, was sufficient proof of diligence to let in secondary evidence.

[8] Hall v. Bland, 3 M. & G. 247; Cruise v. Clancy, 6 Ir. Eq. 552; Ploxton v. Dare, 10 B. & C. 17; Taylor on Ev. (1st ed.) 307.

[9] Rex v. Pidlehinton, 3 B. & A. 460.

[10] Prussing v. Jackson, 208 Ill. 85, 69 N. E. R. 771.

[11] Fitz v. Rabbits, 2 M. & R. 60.

[12] Porter v. Wilson, 13 Penn. St. 541.

[1] Webster v. Clark, 30 N. H. 245; Reading R. R. Co. v. Johnson, 7 W. & S. (Penn.) 317; Waring v. Warren, 1 John. (N. Y.) 340; Com. v. Parker, 2 Cush. (Mass.) 212; Dennis v. Barber, 6 S. & R. (Penn.) 426; Pond v. Lockwood, 8 Ala. 667; Dean v. Borden, 15 Tex. 298; Anderson Bridge Co. v. Applegate, 13 Ind. 339; Turnpike Co. v. Whiting, 10 Mass. 327; Myer v. Barker, 6 Binn. (Penn.) 228.

[2] Narragansett Bank v. Atlantic Silk Co., 3 Met. Mass.) 282; Loring v. Whittemore, 13 Gray (Mass.), 228; Cooper v. Granberry, 33 Miss. 117; Fraux v. Fraux, 2 N. J. L. 166; Jackson v. Livingston, 7 Wend. (N. Y.) 136; Sheldon v. Wood, 2 Bosw. (N. Y.) 267; Faribault v. Ely, 2 Dev. (N. C.) L. 67; Sally v. Geinter, 13 Rich. (S. C.) 72; Maxwell v. Light, 1 Call (Va.), 117; Riggs v. Taylor, 9 Wheat. (U. S.) 83; Bright v. Young, 15 Ala. 112; Rowley v. Doe, 6 Blackf. (Ind.) 143; Smith v. Reed, 7 Ind. 242; Greenough v. Shelden, 9 Iowa, 503; McDowell v. Hall, 2 Bibb (Ky.), 610; Bank of Kentucky v.

The notice to produce must be served a reasonable time before the trial, and the question as to what is a reasonable time will depend upon the circumstances of the case, the distance at which the party lives from the place of trial, or from the place where the paper is kept, and his power to produce it.[3] Thus, where the party's counting-house was near the court-house, notice to produce his books, given the evening before the trial, was held to be reasonable;[4] and the same day, where the party lived near the court-house;[5] and the day before, even where the paper was in the possession of a person eighty miles away;[6] and several days before, where the party lived out of the State;[7] and even on trial, if the paper is in court;[8] and generally the sufficiency of the notice, both as to matter and the time, rests in the discretion of the court in view of all the circumstances.[9] One notice given in the same suit is good, although the action is not tried for years afterwards,[10] and even upon a new trial of the action.[11] But a notice entitled in another cause to produce books in evidence, merely filed in the present cause, without proof of service, raises no inference against the party to whom the notice is addressed.[12]

The notice should be in writing,[13] but, unless the statute or rules of court otherwise provide, there is no reason why a verbal notice is not sufficient.[14] If the notice is in writing, it may be directed either to the party or his attorney,[15] and may be served on either, or may be left with the attorney's clerk at his office, or at the dwelling-house of the party, in the hands of his servant;[16] and if

McWilliams, 2 J. J. Marsh. (Ky.) 256; McQueen v. Sandel, 15 La. Ann. 140; Lowell v. Flint, 20 Me. 401; Thayer v. Middlesex Mutual Insurance Co., 10 Pick. (Mass.) 326.

[3] Shreve v. Dulaney, 1 Cr. (U. S. C. C.) 499; Hammond v. Hopping, 13 Wend. (N. Y.) 505; Jefford v. Ringold, 6 Ala. 544.

[4] Shreve v. Dulaney, *ante*.

[5] Buckner v. Morris, 2 J. J. Mar. (Ky.) 121.

[6] Cady v. Hough, 20 Ill. 43.

[7] Jefford v. Ringold, 6 Ala. 644.

[8] Board, &c., v. Finnemore, 1 N. Y. L. 242; Atwell v. Miller, 6 Md. 10; Brown v. Oshell, 11 Ala. 109; McPherson v. Rathbone, 7 Wend. (N. Y.) 216; Anonymous, Anth. (N. Y.) 199. But a notice given during the trial is not sufficient, if the paper is not in court. Durkee v. Leland, 4 Vt. 612; Barker v. Barker, 14 Wis. 131; Burtin v. Kane, 17 id. 37.

[9] Cummings v. McKinney, 5 Ill. 57.

[10] Gilmore v. Wade, Anth. (N. Y.) 64; Jackson v. Shearman, 6 John. (N. Y.) 19; Patten v. Goldsborough, 9 S. & R. (Penn.) 47.

[11] Hope v. Beadon, 17 Q. B. 209.

[12] Allender v. Vestry of Trinity Church, 3 Gill (Md.), 166.

[13] Cummings v. McKinney, *ante*.

[14] Houseman v. Roberts, 5 C. & P. 394; Cates v. Winter, 3 T. R. 306; Hughes v. Budd, 8 Dowl. 315.

[15] Brown v. Littlefield, 7 Wend. (N. Y.) 454; Divers v. Foulton, 8 G. & J. (Md.) 402; Logan v. Patterson, 1 Blackf. (Ind.) 327.

[16] Doe v. Martin, 1 M. & R. 242; Evans v. Swett, Ry. & M. 83.

it is served on both, a bad service upon one will not invalidate the notice to the other.[17] The notice is sufficient if it specifies the paper desired with sufficient certainty to indicate what paper is meant.[18] Thus, notice was given to an attorney of the defendant to produce on the trial a certain letter written by the plaintiff to the defendant, concerning an execution which was produced on a former trial in the same cause, "and all other papers in your custody or power relating to the matter in controversy in this cause." It was held that the notice was sufficiently explicit to apprise the attorney that the execution was one of the papers which he was called upon and expected to produce, especially when it was shown that on such former trial the letter and execution had been produced by the defendant's attorney himself, and he must have known that it was the principal paper wanted.[19] A notice to produce "all letters written by plaintiff to defendant relating to the matters in dispute in this action,"[20] or "all letters written to, and received by, plaintiff between 1837 and 1841, both inclusive, by and from the defendants, or either of them, and all papers, etc., relating to the subject-matter of this case,"[21] has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. So a notice to produce "all accounts, papers and writings in any way relating to the matters in question in this case" sufficiently particularizes a written account of the work done by the plaintiff, delivered to the defendant, and admitted by him to be correct.[22] And in a more recent case a notice to produce "all letters relating to your tenancy of a room, etc., was held sufficient to include a letter which, with the plaintiff's reply, constituted the tenancy.[23] The notice must not, however, be too general, as "all letters."[24] In an early English case[25] it was held by BEST, C. J., that a notice to produce "all letters, papers and documents touching or concerning the bill of exchange mentioned in the declaration, and the bill sought to be recovered," did not suf-

[17] Hughes v. Budd. *ante.*

[18] Bogart v. Brown, 5 Pick. (Mass.) 18; Bemis v. Charles, 1 Met. (Mass.) 440; Walden v. Davison, 11 Wend. (N. Y.) 65.

[19] Walden v. Davison, 11 Wend. (N. Y.) 65.

[20] Jacob v. Lee, 2 M. & Rob. 33, PATTESON, J.

[21] Morris v. Hauser, id. 392, Lord DENMAN, C. J.

[22] Rogers v. Custance, 2 M. & Rob. 179.

[23] Conybeare v. Farries, L. R., 5 Exch. 16.

[24] Gardner v. Wright, 15 L. T. N. S. 325; Jones v. Edwards, McCl. & Y. 139.

[25] France v. Lucy, Ry. & M. 341.

ficiently describe a notice of dishonor sent by the plaintiff to the defendant. But this decision is not consistent with the more recent cases cited above. If the title of the cause is misdescribed in the notice, it has been held bad.[26] But in that case no title at all was necessary, and there were other grounds of decision; nor was there in that case any ground for supposing that the misdescription could mislead. In a later case, where the notice was entitled in a wrong court, it was considered sufficient.[27] Notice to produce a letter purporting to enclose an account is sufficient notice to produce the account.[28]

It is generally not desirable to enter into a minute description of the paper or papers covered by the notice, because if any material errors were to creep into the particulars the party might urge with possible success that he had been misled thereby. If enough is stated in the notice to induce the party to believe that a particular instrument will be called for, it is sufficient.[29]

The question whether there is sufficient evidence that the opposite party has the papers involved in the notice, where they are not such as should be in his possession, is for the court.[30]

The fact of the service of the notice must be proved, and as to this the mere statement of counsel is not sufficient.[31]

Sec. 10. When Notice to Produce, is unnecessary.

There are several instances in which, although the writing is in the hands of the opposite party, no notice to produce it is necessary, as a preliminary to letting in secondary evidence of its contents.

These exceptions to the general rule are:

1st. *Where the instrument is in the hands of the adversary, and that tendered in proof is either a duplicate or counterpart, and the part offered was executed by him or by some person through whom he claims.*[1]

[26] Harvey v. Morgan, 2 Stark. 19.
[27] Lawrence v. Clark, 14 M. & W. 250.
[28] Engall v. Druce, 9 W. R. 536.
[29] Rogers v. Custance, *ante*.
[30] Hervey v. Mitchell, 2 M. & R. 366.
[31] Landt v. McCullough, 206 Ill. 214, 69 N. E. 107.

[1] If two letters are written at the same time to the same person, one being the exact counterpart of the other, one being sent to the person addressed, and the other retained by the writer, each is an original, and the one retained may be put in evidence by the party who retained it, without notice to the opposite party to produce the other. Hubbard v. Russell, 24 Barb. (N. Y.) 404.

2d. *Where the instrument to be proved is itself a notice,*[2] as a notice to quit,[3] or of the dishonor of a bill,[4] where the action is brought upon the bill, but not otherwise.[5]

3d. *Where from the nature of the action, or indictment, the party must know that he will be charged with the possession of the instrument.*[6]

Thus in an action of trover for the conversion of a bond,[7] or other writing,[8] or in a prosecution for stealing a document no notice to produce is necessary,[9] and this is so even though the defendant offers to produce the document.[10] In an action for damages for not delivering a telegram this rule was applied,[11] as also in an action of assumpsit against a carrier for the non-delivery of written instruments.[12]

4th. *In odium spoliatoris, notice need not be given to the opposite party to produce a paper of which he has fraudulently or forcibly obtained possession.*[13]

[2] Notice to produce a notice, is not requisite to let in evidence of its contents. Atwell v. Grant, 11 Md. 101; Central Bank v. Allen, 16 Me. 41; Fairbault v. Ely, 2 Dev. (N. C.) L. 67; Eagle Bank v. Chapin, 3 Pick. (Mass.) 180; Falkner v. Beers, 2 Doug. (Mich.) 117; Christy v. Horne, 24 Mo. 242; Leavitt v. Simes, 3 N. H. 14; Morrow v. Commonwealth, 48 Penn. St. 305; Kine v. Beaumont, 3 B. & B. 291.

[3] Jory v. Orchard, 2 B. & P. 41; Calling v. Frederick, 6 B. & C. 398; Doe v. Somerton, 7 Q. B. 58; Phillipson v. Chase, 2 Camp. 111.

[4] Swain v. Lewis, 26 M. & R. 261; Kine v. Beaumont, *ante;* Auckland v. Pearce, 2 Camp. 601. The cases overrule Langdon v. Hulls, 5 Esp. 156, and Shaw v. Markham, Peake, 165.

[5] Lanauze v. Palmer, M. & M. 31.

[6] Reliance Lumber Co. v. Western Union Tel. Co., 58 Tex. 394; 44 Am. Rep. 622; State v. Mayberry, 48 Me. 218; Keller v. Savage, 20 Me. 199; Rose v. Lewis, 10 Mich. 483; Hart v. Robinet, 5 Mo. 11; Neally v. Greenough, 25 N. H. (5 Fost.) 325; Hammond v. Hopping, 13 Wend. (N. Y.) 505; Hardin v. Kretsinger, 17 Johns. (N. Y.) 293; Edwards v. Bonneau, 1 Sandf. (N. Y.) 610; Forward v. Harris, 30 Barb. N. Y.) 338; Pickering v. Myers, 2 Bailey (S. C.), 113; Hamilton v. Rice, 15 Tex. 382; Dean v. Border, 15 id. 299.

[7] Hays v. Riddle, 1 Sandf. (N. Y.) 248.

[8] Calling v. Frederick, *ante.*

[9] Rex v. Aickles, 1 Lea. 297*n;* Rex v. Brennan, 3 Cr. & Dix. 109; Com. v. Messinger, 1 Binn. (Penn.) 373.

[10] Whitehead v. Scott, 1 M. & Rob. 2.

[11] Reliance Lumber Co. v. Western Union Tel. Co., *ante.* See Western Union Tel. Co. v. Hopkins, 49 Md. 327, *contra;* but the question does not seem to have been much considered by the court.

[12] Jolly v. Taylor, 1 Camp. 143. Under this rule it has been held that if an action is brought upon a written contract, which is fully described in the declaration, and the contract is in the possession of the defendant, the plaintiff may introduce secondary evidence of its contents without previously giving a special notice to the defendant to produce it. Dana v. Conant, 30 Vt. 246.

[13] Doe v. Ries, 7 Bing. 724; Leeds v. Cook, 4 Esp. 256.

5th. *Where the party or his attorney has admitted the loss of the paper or denies having it,*[14] because in such case the notice would be nugatory.

But the party cannot excuse himself from giving notice by introducing evidence to show the destruction of a document which has been traced into the possession of his adversary, because the document *may* still be in existence, and his opponent may in any event dispute the fact of its destruction.[15]

Sec. 11. Effect of Notice to Produce Papers.

A paper is not made evidence by a notice calling for its production, and the party calling for it may afterwards waive its production.[1] Nor does it become evidence for the other party, unless from its legal character it is entitled to be used as such;[2] and it must be proved by the person who offers it in like manner as if he himself had produced it. But if the person producing it is a party to the instrument, or claims a beneficial interest under it, it is *prima facie* to be taken to be duly executed, and may be read without proof of its execution.[3] The refusal of a party to produce books or papers, upon notice given, does not warrant the presumption that, if produced, they would show the facts to be as alleged by the party giving the notice. The only effect of such refusal is, that parol evidence of their contents may be given; and if such secondary evidence is imperfect, vague, and uncertain as to dates, sums, etc., every intendment and presumption shall be against the

[14] Safe Deposit & Trust Co. v. Turner, 98 Md. 22, 55 A. 1023, 1027; How v. Hal, 14 East, 276; Rex v. Haworth, 4 C. & P. 254; Doe v. Spitty, 3 B. & Ad. 182; Foster v. Pointer, 9 C. & P. 718. Notice to produce letters which the other party, the addressee, denies having received, is unnecessary. Bickley v. Bickley, 136 Ala. 548, 34 So. 946. But it has been held that where a party claims that a certain written instrument is in the hands of the other party he cannot offer secondary evidence of it unless he has previously given notice to produce even though the party charged with having the instrument absolutely denies its existence at the trial. Clary v. O'Shea, 72 Minn. 105, 75 N. W. 115, 71 Am. St. Rep. 465

[15] Doe v. Morris, 3 Ad. & El. 46.

[1] The failure of one party to produce a written document or other evidence called for by his opponent is only a circumstance weighing heavily against the party and does not dispense with the necessity of some independent evidence in support of the claim of the other party. Stout v. Sands (W. Va., 1904), 49 S. E. 428; Blight v. Ashley, 1 Pet. (U. S.) 573; Sayer v. Kitchen, 1 Esp. 210.

[2] Hylton v. Brown, 1 Wash. (U. S.) 343; Sayer v. Kitchen, *ante.*

[3] Rhoades v. Lelin, 4 Wash. (U. S.) 715; Betts v. Badger, 12 Johns. (N. Y.) 223; Jackson v. Kingsley, 17 id. 157.

party who might remove all doubt by producing the higher evidence. Some general evidence of such parts of their contents as are applicable to the case must first be given before any foundation is laid for any inference or intendment on account of their non-production.[4] The refusal of a party to produce papers, upon notice, as well as the failure of the party giving the notice to use them, if produced, is a matter for observation to the jury;[5] and if the papers are shown to be in the possession or subject to the control of the party upon whom the notice is served, the failure to produce them will warrant the court in instructing the jury that they may, from such failure, presume that the papers or books, if produced, would operate unfavorably to his cause.[6] Notice to produce a paper will not entitle the person giving it to cross-examine a witness as to its contents,[7] except after refusal to produce.[8] If the party refuses to produce the paper for the use of the party giving the notice, he cannot afterwards use the original either to contradict the secondary evidence,[9] or to show that there are attesting witnesses who ought to be called,[10] or to refresh the memory of

[4] Life & Fire Ins. Co. v. Mechanics' Ins. Co., 7 Wend. (N. Y.) 31; see, also, Hanson v. Eustace, 2 How. (U. S.) 653; Jewell v. Center, 25 Ala. 498; Hunt v. Collins, 4 Iowa, 56; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1. Though, where a party has in his possession a deed or other instrument necessary to support his title, and he refuses to produce it, and attempts to make out his title by other evidence, such refusal raises a strong presumption that the legitimate evidence would operate against him, yet this rule is not applicable to such documents as he has no right to give in evidence without the consent of the adverse party, the only effect of the refusal, in such case, being to authorize the adverse party to give secondary evidence of the contents of the documents withheld. Merwin v. Ward, 15 Conn. 377. When a party refuses to produce books and papers which are shown to be in his possession, his opponent may give secondary or parol proof of their contents; and if such secondary evidence is imperfect, vague, and uncertain as to dates, sums, boundaries, etc., every intendment and presumption shall be against the party in possession of the higher evidence, and refusing to produce it. Rector v. Rector, 8 Ill. 105; Shortz v. Unangst, 3 Watts & S. (Penn.) 45. Of course, in order to make secondary evidence admissible because of a failure to produce a writing it must be shown that the writing is actually in a party's custody, or at least is one of which he is entitled to the custody. Thus, notice to the opposite party to produce a *fi. fa.* is not foundation sufficient to admit a copy in evidence. Bell v. Chandler, 23 Ga. 356.

[5] Bate v. Kinsey, 1 C., M. & R. 41; see Sayer v. Kitchen, 1 Esp. 235, as to failure of party giving notice to use the papers when produced; and see, also, Wilson v. Bower, 1 C. & P. 10; Wharam v. Routledge, 5 Esp. 235.

[6] Clifton v. United States, 4 How. (U. S.) 242.

[7] Graham v. Dyster, 2 Stark. 23.

[8] Id.

[9] Thompson v. Hodgdon, 12 Ad. & El. 135.

[10] Edmonds v. Challis, 7 C. B. 413; Jackson v. Allen, 3 Stark. 74.

witnesses,[11] or, it seems, for any purpose,[12] but is in effect bound by any legal and satisfactory evidence given on the other side relating thereto,[13] unless he has some sufficient and satisfactory excuse for not complying with the notice.

Where a party on request furnishes to his opponent for use in a trial a copy of a letter he sent to his opponent he has waived his right to a production of the original.[14] A copy of a copy of an instrument is not admissible after the failure of the party having the instrument on due notice to produce the original in the absence of some evidence to show why the copy made from the original was not produced.[15]

The courts of common law, as well as equity, may order the production for inspection of writings in the possession of one party to a suit for some special reason, as where there is reason to suspect that the document is forged.[16] A party, however, may not be ordered to produce all his books upon the mere suspicion that they might possibly contain some evidence favorable to the opposite party, and without pointing to any particular part of all of the books over which the suspicion was supposed to hover. The court will not tolerate a fishing expedition to be carried out in this way.[17] An order for the production of books will be granted only against those having their control or custody.[18]

In order to render a notice operative to let in secondary evidence, it must be shown that the original instrument is in the hands of the opposite party or of those in privity with him.[19] The nature of this evidence must vary according to the nature of the instrument, and where it belongs exclusively to the party, slight evidence will suffice.[20] If the instrument has been delivered to a third person, in privity with the party, notice to the latter is suf-

[11] Till v. Ainsworth, WILDE, C. J., *MS.*, Bristol, 1874.

[12] Collins v. Garbon, 2 F. & F. 47.

[13] Where a party has an instrument in his possession which he refuses on notice to produce, the other party may testify to a copy of the instrument although he cannot remember its entire language, if he thinks it is a copy as near as he can tell. Bishop v. American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317.

[14] Barnett v. Wilson, 132 Ala. 375, 31 So. 521.

[15] State v. Cohen, 108 Iowa 208, 78 N. W. 857, 75 Am. St. Rep. 213.

[16] Dock v. Dock, 180 Penn. St. 14, 36 A. 411, 57 Am. St. Rep. 617.

[17] *Ex parte* Clarke, 126 Cal. 235, 58 P. 546, 77 Am. St. Rep. 176.

[18] National Fertilizer Co. v. Holland, 107 Ala. 412, 18 So. 170, 54 Am. St. Rep. 101.

[19] Landt v. McCullough, 206 Ill. 214, 69 N. E. 107.

[20] Henry v. Leigh, 3 Camp. 502.

ficient,[21] as also is notice to his attorney.[22] Notice to a party to produce a check, or a note which has been paid, which is in the hands of his banker, is sufficient,[23] or to produce papers belonging to him which are in the hands of his attorney.[24] An attorney may be compelled to produce his client's papers and cannot rely on his privilege. The rule was formerly otherwise, but, as the privilege is that of the client and not of the counsel, when by change in the law the client could be compelled to testify as a party and produce papers, the attorney was also subject to the same rule.[25] Where a deed is shown to be delivered to a person since deceased, and the house in which he lived is occupied by members of his family, a notice on them to produce the deed may be sufficient to admit secondary evidence of its contents.[26]

If, at the time the notice was served, the paper was in the hands of the party, he cannot afterwards get rid of it so as to avoid the effect of the notice.[27] So copies may be put in evidence by the plaintiff where the originals were destroyed by fire while in the hands of the defendant after he had been given notice to produce them,[28] But if the plaintiff becomes non-suited in the action after the service of the notice, and after the non-suit the party assigns the paper to a third person, and upon a second trial the plaintiff again serves notice upon him to produce the paper, secondary evidence of its contents will not be admissible;[29] and the same has been held where, before notice was served, the paper was delivered to a third person, under whom the defendant justified in an action of trespass, and it was held that a subpoena *duces tecum* to such third person was necesary.[30]

Sec. 12. What Secondary Evidence of Writings Sufficient.

It is said that, as a general rule, there are no degrees in secondary evidence,[1] and that upon proof of the loss or destruction of a writing, or upon the failure of the opposite party to produce it

[21] Baldney v. Ritchie, 1 Stark. 338.
[22] Taplin v. Atley, 3 Bing. 164; Suter v. Burrell, 2 H. & N. 867.
[23] Partridge v. Coates, Ry. & M. 156.
[24] Irwin v. Lever, 2 F. & F. 295.
[25] Jones v. Reilly, 174 N. Y. 97, 66 N. E. R. 649.
[26] Uzzell v. Horn (S. C., 1905), 51 S. E. 253.
[27] Knight v. Martin, Gow. 104; Sinclair v. Stevenson, 1 C. & P. 585.
[28] Rudgear v. United States Leather Co., 206 Ill. 74, 69 N. E. R. 30.
[29] Knight v. Martin, *ante*.
[30] Evans v. Sweet, Ry. & M. 183.
[1] Carpenter v. Dame, 10 Ind. 125.

upon notice, the contents of the writing may be proved even by parol,[2] and the party is not bound to show that no copy of the writing exists. But this rule would seem not to apply to documents of which certified copies or transcripts may be had.[3] He must produce satisfactory evidence of the contents of the writing, and there can be no question but that a well authenticated copy is the most satisfactory substitute for the original document. But no copy whatever is admissible, unless its accuracy is sworn to, or there is some presumption attached to it from which its accuracy may be presumed,[4] as is the case in reference to a very old instrument purporting to be a copy or abstract of a conveyance,[5] when it can be traced to the custody of some grantee of the lands, but not where it comes from a custody unconnected with the lands.[6] A copy of a letter taken by a copying machine, although still only a copy, will be presumed to be correct.[7] And such, also, is the rule as to entries made by a deceased clerk in a letter book, when it is shown that in the course of business, letters relating to the business of the plaintiff were copied in the letter book by such clerk.[8] The rule allowing the production of copies or parol evidence where the original is lost or destroyed, or is in the possession of the opposite party, who, upon notice, neglects to produce it, applies to all classes

[2] Granger v. Warrington, 8 Ill. 299; Jackson v. Cullam, 2 Blackf. (Ind.) 288; Young v. Buckingham, 5 Ohio, 485; Gore v. Elwell, 22 Me. 442; Clark v. Trindle, 52 Penn. St. 492; Thayer v. Stearns, 1 Pick. (Mass.) 109; Denton v. Hill, 4 Hayw. (Tenn.) 73; Small v. Pennell, 31 Me. 267; Sanders v. Sanders, 24 Ind. 133; Jones v. Fayles, 5 Mass. 101.

[3] Where a certificate of entry on land is recorded and lost a certified copy is the next best evidence and parol evidence as to it will not be received. Martin v. Brand, 182 Mo. 116, 81 S. W. 443. Where it appears that a transcript of a lost record, previous to its loss, in a proceeding authorized by law, has been filed in another court, and this is known or should be known to the party offering to prove the record, the presumption is that it remains in that court, and it is the best secondary evidence of the contents of the original record, and must be produced or its absence explained, before parol evidence can be heard. Southern Ry. Co. v. Seymour, 113 Tenn. 523, 83 S. W. 674.

[4] Fisher v. Samuda, 1 Camp. 190.

[5] Price v. Woodhouse, 3 Exch. 616; Buller's N. P. 254; Bullin v. Michel, 2 Price, 399; Williams v. Wilcox, 8 Ad. & El. 314.

[6] Potts v. Durant, 3 Amst. 789; Paddock v. Whitcomb, 6 Exch. 601.

[7] Hadin v. Murray, 3 Camp. 228; Simpson v. Thorneton, 1 F. & F. 452. In Sturge v. Buchanan, 10 Ad. & El. 598, it was held that a letter book containing copies of letters which the defendant wrote to a third person, consented to admit under a notice to produce the letters, would be presumed to contain true copies of the letters.

[8] Pritt v. Fairclough, 3 Camp. 305; Hagedorn v. Reed, 3 id. 377.

of instruments, as records of judgments,[9] executions,[10] wills,[11] account books,[12] writs or other process,[13] bonds,[14] and other specialties,[15] contracts or agreements,[16] deeds,[17] patents,[18] incorporation papers,[19] or indeed any instrument in writing which has been lost or destroyed,[20] or as to *parts* of such instruments which have been mutilated so as to be illegible.[21]

There are four classes of copies which may be used to prove the contents of documents, and their value as such proof is in the order in which they are given: *Exemplified, Office, Certified* and *Examined. Exemplified* copies are those which are attested under the great seal, or under the seal of the court in which the record is preserved.

An *office* copy is a copy made by the officer having the custody of the document in the same court, and in the like cause, and is equivalent to the original document of which it is a copy.[22] In this country, however, "office copies" include all certified copies made by officers, whether of courts or otherwise, who by law are made certifying officers, and copies, made by whom, and certified,

[9] Jackson v. Collam, 2 Blackf. (Ind.) 228; Pruden v. Allen, 23 Pick. (Mass.) 184; Sanders v. Sanders, 24 Ind. 133; Small v. Pennell 31 Me. 267; Lane's Will, 2 Dana (Ky.), 106; Clark v. Trindle, 52 Penn. St. 492; Farmers' Bank v. Gibson, 6 id. 51; Young v. Buckingham, 5 Ohio, 485.

[10] Ellis v. Huff, 29 Ill. 449.

[11] Lane's Will, *ante;* Smith v. Carter, 3 Rand. (Va.) 169.

[12] Keaton v. Davis, 18 Ga. 457 *n.* Lost account books proved by trial balances drawn by bookkeeper. Safe Deposit & Trust Co. v. Turner, 78 Md. 22, 55 A. 1023, 1027.

[13] Fowler v. Moore, 4 Ark. 570; Brown v. Richmond, 28 Vt. 583; Allen v. State, 21 Ga. 217; Derret v. Alexander, 25 Ala. 265; Bartlett v. Hunt, 17 Wis. 214; Com. v. Raank, 8 Cush. (Mass.) 210.

[14] Stakes v. Prescott, 4 B. Mon. (Ky.) 37.

[15] Kelly v. Riggs, 2 Ratt. (Conn.) 126.

[16] Gwattney v. Wheeler, 26 Ind. 415; Morrison v. Chapin, 97 Mass. 72.

[17] In McBurney v. Cutler, 18 Barb. (N. Y.) 203, it was held that, to prove the execution of an alleged lost deed, it is not necessary to prove by a witness that he remembered having seen a seal on it; the fact might be shown by other and circumstantial evidence; and evidence that the instrument was executed, and intended, and purported to convey lands, and in connection with it, evidence of the declarations of the grantor that he had conveyed lands, is evidence proper to go to a jury, and is sufficient to authorize them, if the testimony is believed, to find that the instrument was under seal.

[18] Long v. Davis, 4 Mich. 140.

[19] Secondary evidence of lost incorporation papers need not be so full as that they may be reproduced, but it is sufficient if it shows that the requirements of the statutes were fulfilled. People v. Pike, 197 Ill. 449, 64 N. E. R. 393.

[20] Adams v. Guice, 30 Miss. 397; People v. Dennis, 4 Mich. 609; Orm v. Cook, 31 Ill. 283.

[21] Senterfeit v. Shealy (S. C., 1905), 51 S. E. 142; Fullis v. Griffith, Wright (Ohio), 303.

[22] Lucas v. Fulford, 2 Burr. 1179.

are made admissible in evidence. In other words, "office copies" include "certified copies."

A *certified* copy is a copy made by an officer having the custody of a document or of a record, and certified by him to be correct. Where the statute makes such person a certifying officer, and provides that copies certified by him shall be evidence, such copies, in degree, stand next to the original instrument.

An *examined* copy is a copy of an instrument, verified by the oath of a witness who has compared it with the original, word for word and line for line, and swears that it is correct.[23] The copy must be exact, and must not contain abbreviations which are not in the original,[24] and some evidence must be given to show that it was copied from the original,[25] as a copy of a copy is never admissible,[26] except in those instances where the copy from which the copy is made possesses the essential elements of the original, as, a copy from a certified copy made by a certifying officer,[27] or from a press copy of a letter,[28] because in the latter instance the signature is in the handwriting of the person writing it, thus making it possible to authenticate the genuineness of the instrument from which the second copy was made.

For instances in which copies are admissible, and showing what kind of copies must be used, and how proved, see chap. XIX, "*Documentary Evidence.*"

[23] Reid v. Margison, 1 Camp. 469.
[24] Rex. v. Christian, C. & M. 388.
[25] Adamthwayte v. Sym. 4 Camp. 372.
[26] Brown v. Warren, &c., R. R. Co., 5 Gray (Mass.), 35. But this rule does not apply to a certified copy of a recorded deed (Stetson v. Gulliner, 2 Cuch. [Mass.], 494), nor to one sworn to be correctly made from a press copy of a letter, Goodrich v. Weston, 102 Mass. 362.
[27] Stetson v. Gulliner, *ante.*
[28] Goodrich v. Weston, *ante.*

CHAPTER II.

Parol Evidence as to Writings.

Section 13. General rule.
14. Latent ambiguities, what are, rule as to.
15. To correct mistaken description of devisee.
16. Party's direct statements of intention.
17. To apply description to real estate.
18. Patent ambiguity or indefiniteness.
19. Conduct of parties at the time of and after the execution of a writing.
20. To explain or vary legal effect of unambiguous writing.
21. Prior and contemporaneous independent agreements. Incomplete contracts.
22. Receipts, releases and tickets.
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24. To prove collateral matters.
25. To show that writing never legally existed. (Fraud, illegality, escrow, etc.)
26. Consideration.
27. Mistake.
28. Waiver, alteration or discharge of contract.
29. To show warranty.
30. To show that writing apparently absolute is a security or trust instrument.
31. Agency or signature in representative capacity.
32. When an independent contract is entered into as an inducement to the execution of the principal contract.
33. Several writings may be looked at to determine the real contract and intention of the parties.
34. As to third parties.
35. Judicial, corporate and official records.
36. Assignments.
37. Negotiable instruments.
38. Bills of lading.
39. Bills of sale.
40. Leases, deeds, and mortgages.
41. Custom or usage.
    A. Parol evidence of usage, admissible when.
    B. Qualities and proof of binding usage.
    C. Need not necessarily be general.
    D. Must be established by instance of its application.
    E. General usage, how established. By one witness.
    F. Mere conflict of evidence as to, does not defeat.
    G. Effect of local or trade usage.
    H. Usage in particular market.
    I. Usage must be reasonable and legal.
    J. Usage as a means for ascertaining the meaning of words and phrases.
    K. Rule when words have well defined meaning.
    L. Usage may add incidents to contracts. Illustrations.
    M. Rule when ambiguity is created by parol proof.

Sec. 13. General rule.

The so-called "parol evidence" rule consists of a collection of various rules of substantive law and one rule of evidence. The Statute of Frauds and the Statute of Wills and the presumption that parties in putting anything in writing intended to embrace the whole transaction are the most familiar examples of substantive law embraced in the "rule" while the rule of evidence included in it is that forbidding evidence of direct statements of the intention of the writer except in case of equivocation—where his language may apply equally well to two or more things.[1]

The "parol evidence" rule may be shortly stated, that, in the absence of any latent ambiguity therein, *parol evidence is not admissible to explain, vary or contradict a written instrument.* The general rule is that when an agreement is reduced to writing it, as between the parties, merges and overcomes all prior or contemporaneous negotiations and declarations upon the subject, and oral evidence is not admissible to vary, explain or contradict its terms, for the writing is conclusively presumed to contain the whole engagement of the parties. There are two exceptions to this rule, the first of which includes those cases in which parol evidence has been received, not to vary or contradict, but to destroy written instruments, for fraud, illegality, want of consideration or other fundamental inadequacies upon the theory that the written instrument was never a valid and subsisting agreement, and the second of which embraces those cases which recognize the writing as existing and valid, but regard it as incomplete, either obviously or at least possibly, and admit parol evidence, not to contradict or to vary, but to complete the entire agreement of which the writing was only a part. Two essentials must accompany the second exception. First, the writing must not appear, upon inspection, to be a complete contract, embracing all the particulars necessary to make a perfect agreement, and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract; second, the parol evidence must be consistent with, and not contradictory of, the written instrument.[2] The Statute of Frauds requires that certain con-

[1] See Thayer Prem. Treatise on Evidence, pp. 390-403.

[2] Mead v. Dunlevie, 174 N. Y. 108, 66 N. E. R. 658.

Albert v. Zeigler, 29 Penn. St. 50; Shankland v. Washington, 5 Pet. (U. S.) 390; Peter v. Grover, 20 Mo. 363; Wade v. Odeneal, 3 Dev. (N. C.) L.

tracts shall be in writing, and thus, by implication, excludes all evidence relating to contracts which are not in writing.[3] So, too, in other cases, it is the duty of certain officers to record, in a manner more or less solemn, what is said or done, as in the case of records of courts of law, or depositions taken before magistrates in criminal cases. How far such authentic memorials are conclusive is not very well settled, but they are certainly so in some cases. It is obvious that evidence might frequently be objected to as infringing more than one of these rules, and, where several objections might be good it is not always easy to see which of the two, in a given case, forms the *ratio decidendo.*

Sec. 14. Latent Ambiguities, what are, rule as to.

Under the general rule as stated *supra,* it follows as a matter of course, that, *whenever there is a complete written agreement all previous conversations and verbal agreements of the parties are merged therein,* and cannot be shown to alter or vary the writing[1]

423; Warren v. Crew, 22 Iowa, 315; Huffman v. Hannuer, 17 N. J. Eq. 269; Ferguson v. Glaze, 12 La. An. 667; Herndon v. Henderson, 41 Miss. 584; Smith v. Higbee, 12 Vt. 113; Irwin v. Ivers, 7 Ind. 308; Wynn v. Cox, 5 Ga. 373; Young v. Frost, 5 Gill (Md.), 287; Smith v. McCall, 1 McCord (S. C.), 220; Reed v. Jones, 8 Wis. 392; Hoxie v. Hodges, 1 Oregon, 251; Lenhard v. Vischer, 2 Cal. 37; Richardson v. Comstock, 21 Ark. 69; Grundy v. Edwards, 7 J. J. Mar. (Ky.) 67; Robinson v. Mogandy, 28 Ill. 423; Beckley v. Munson, 22 Conn. 299; West v. Kelly, 19 Ala. 353; Gooch v. Cannon, 8 Mo. 391; Tits v. Brown, 20 N. H. 393; Hall v. Adams, 1 Hill (N. Y.), 601. The ordinary rules as to the introduction of parol evidence to contradict a written instrument apply to an agreement between Indian tribes. Delaware Indians v. Cherokee Nation, 193 U. S. 127, 24 S. Ct. 342.

[3] Northrup v. Jackson, 13 Wend. (N. Y.) 85; Lecroy v. Wiggins, 31 Ala. 13; Lackett v. Lobey, 10 La. An. 713; Martin v. Duffey, 4 Phil. (Penn.) 75.

[1] Smith v. Higbee, 12 Vt. 113; Cole v. Spann, 13 Ala. 537; Herndon v. Henderson, 41 Miss. 584; Vaughn v. Lynn, 9 Md. 870; Dean v. Mason, 4 Conn. 428; Chadwick v. Perkins, 8 Me. 399; Crosier v. Acor, 7 Paige, (N. Y.) Ch. 137; French v. Turner, 15 Ind. 59; Walker v. Engler, 30 Mo. 130; Mead v. Steger, 5 Port. (Ala.) 498; Cox. v. Bennett, 13 N. Y. L. 165; Logan v. Bond, 13 Ga. 192; Downie v. White, 12 Wis. 176; Stevens v. Cooper, 1 John. (N. Y.) Ch. 425; Caldwell v. May, 1 Stew. (Ala.) 425; Gelpcke v. Blake, 15 Iowa, 387; Cincinnati, &c., R. R. Co. v. Peaver, 28 Ind. 502; Walker v. Engler, 30 Mo. 130. A contract which the parties *intended* to but did not make, cannot be shown in place of the one which they did make, Sanford v. Howard, 29 Ala. 684; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; nor can a verbal agreement differing from a written one, entered into before or at the time the written agreement was executed, be given in evidence to supersede or vary the written contract in any of its terms, Cincinnati, &c., R. R. Co. v. Pearce, 28 Ind. 502; Gelpcke v. Blake, 15 Iowa, 387; Jack v. Naber, 15 id. 450; Downie v. White, 12 Wis. 176; nor can evidence of a party's admission be

or to show the intention of the parties,[2] except when there is a *latent* ambiguity in the contract.[3]

Where one conveys his "entire interest in the estate of" his father and it appears *aliunde* that his father was then living and that the grantor therefore had no interest in his estate, this creates a latent ambiguity as to the estate conveyed which may be explained by parol.[4] Under a contract for building an "artesian well," evidence was properly introduced to show that the word "artesian" indicated a well from which the water flowed naturally without artificial pressure,[5] and a contract for delivery of "shares" of stock may be explained by oral evidence that a special kind of stock called "pool shares," which were not to be issued for five years, was intended.[6] Where a contractor had a contract to "make a roadway," parol evidence was inadmissible to show that he was bound to make it of wood, as the contract contained no ambiguity on the subject. The written contract left him the right to build the roadway of any ordinary material and to limit him to wood would be a variation of the contract.[7] It is improper to vary a

shown to vary a writen contract, Fitz v. Brown, 20 N. H. 393; Hale v. Handy, 36 id. 206; nor can the acts of parties be proved to show what construction they placed upon an ambiguous contract, Giles v. Comstock, 4 N. Y. 270; the writing itself, in such cases, is the exclusive evidence of the intention of the parties, Miller v. Fitchorn, 31 Penn. St. 252.

[2] Pullen v. Le Roy, 10 Bos. (N. Y.) 38; Bedford v. Flowers, 11 Humph. (Tenn.) 242; Ellmaker v. Franklin Ins. Co., 5 Penn. St, 183; Pilmer v. Branch State Bank, 16 Iowa, 321.

[3] Gallagher v. Black, 44 Me. 99. In order to properly understand the application of this rule, it should be understood that there are two kinds of ambiguities—*Latent and Patent*. A latent ambiguity is one which does not appear upon the face of the instrument, but arises from an application of the instrument to the subject-matter of the contract, or where it may be applied to either of two persons or things, or may be construed in either of two ways. A patent ambiguity is one which appears upon the face of the instrument, and, from a mere perusal, shows that something is omitted which must be added before it can be ascertained what is meant. Parol evidence is admissible to explain latent ambiguity. McNair v. Sales, 5 Minn, 435; Hartwell v. Canman, 10 N. J. Eq. 128; Hall v. Davis, 36 N. H. 569; Wilson v. Robertson, 7 J. J. Mar. (Ky.) 78; Patrick v. Grant, 14 Me. 233; Shuetze v. Bailey, 40 Mo. 69; Spears v. Ward, 48 Ind. 541; Clark v. Hart, 49 Ala. 86; Wilson v. True, 36 Cal. 606; Mastens v. Freeman, 17 Ohio St. 373; Crawford v. Brady, 35 Ga. 184; Hotchkiss v. Barnes, 34 Conn. 27; Doyle v. Estornet, 13 La. An. 318. But not to explain a *patent* ambiguity. Panton v. Tefft, 22 Ill. 366; Mithoff v. Bryne, 20 La. An. 363; Rawyer v. Martin, 6 Rand. (Va.) 525; Morris v. Edwards, 1 Ohio, 184.

[4] Miles v. Miles, 78 Miss. 904, 30 So. 2.

[5] Hattiesburg Plumbing Co. v. A. E. Carmichael & Co., 80 Miss. 66, 31 So. 536.

[6] Williams v. Ashurst Oil, Land & Development Co., 144 Cal., 619; 78 Pac. 28.

[7] Trustees of Town of Southamp-

contract for the sale of cotton of a certain description by evidence of a parol agreement that the cotton specified in the contract was to be raised on the lands of one of the parties.[8] Where a contract provides that cars shall be loaded as they were the previous year, "viz., loaded full, with the sides built up," etc., parol evidence is admissible to show how they were loaded the previous year, the *videlicet* evidently not being intended to be conclusive.[9] Where a plumber's contract called for "all plumbing" to be accepted by the city plumbing inspectors, but the specifications did not include a certain pipe, oral conversations of the parties at and before the signing of the contract is admissible to show whether such pipe was included in the contract.[10] Where an assignee of oil rights agreed to drill to the "fourth sand" if he did not find oil sooner, the testimony of oil men is admissible as to his right to "shoot" the well by exploding torpedoes in it before reaching the "fourth sand."[11] Parol evidence may be admitted to show that a certain claim was intended to be included within the terms of an agreement to pay "claims of persons who have performed labor upon or furnished material for use in or on said property."[12]

ton v. Jessup, 173 N. Y. 84, 65 N. E. R. 949.

[8] Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

[9] Oliver v. Oregon Sugar Co., 42 Ore. 276, 70 Pac. 902.

[10] Hebb v. Welsh, 185 Mass. 335; 70 N. E. R. 440.

[11] Thorn Hill Oil Co. v. Fort Pitt Gas Co. (Penn. 1902), 51a, 981.

[12] Brown v. Markland, 16 Utah, 360, 52 P. 597, 67 Am. St. Rep. 629.

So, where a farmer contracted in writing to sell "his wool" to a certain person at a certain price, it was held that evidence was admissible to prove that "his wool" meant the wool in his possession bought by him of other farmers as well as wool of his own growth, but was not admissible to prove that only a limited quantity of such wool was intended to be bought. Macdonald v. Longbottom, 1 E. & E. 987; see also Buxton v. Rust, L. R. 7 Exch. 280. In this case, evidence of previous conversations between the parties was admitted to show that the plaintiff had some wool of his own clip, and some which he had purchased, which he was offering for sale. The object of the evidence was to show in what sense the defendant used the term "my wool," by showing by their previous negotiations that, at the time the offer by letter was made, he did not refer to the wool from the plaintiff's clip merely, but to all the seller had on hand. Lord CAMPBELL said: "There cannot be the slightest objection to the admission of evidence of previous conversations, which neither alters nor adds to the written contracts, but merely enables us to ascertain what was the subject-matter referred to therein." In a Vermont case (Hart v. Hammett, 18 Vt. 127) there was a sale of "winter-strained lamp oil" equal to a sample exhibited. The evidence disclosed that there were two kinds of oil of the kind sold, one *sperm* oil, the other *whale* oil, the latter of which was inferior in quality. The court held that evidence was admissible to show that in conversation *at the time the contract was made* this was explained to the purchaser, and that he was then informed that it was not *sperm* oil

And generally it may be said that *parol evidence is admissible to identify and apply the subject-matter of the contract*,[13] but not where the writing distinctly defines the property so as to admit of

he was buying. In an Alabama case (Thorington v. Smith, 8 Wall. [U. S.] 1), during the Rebellion, a contract was entered into to pay "dollars," and parol evidence was held to be admissible to show the circumstances under which the contract was made, and that in fact, at that time and place, the only "dollars" in use were Confederate dollars. But the doctrine of this case is very questionable, and it is not believed that the courts would be inclined to follow it. It does not come within the principle of the other cases cited, and it cannot be said that the evidence created any latent ambiguity. A contract to pay "dollars" is a contract to pay lawful money, and evidence is never admissible to show that it was intended as a contract to pay money of a particular kind or quality; and the rule adopted in the case cited would overturn the whole law of contracts, and place it within the power of a party to completely nullify his contract by showing that it was really a contract to pay in a worthless currency. So, in construing a written contract of service under which A. was "to enter into the employ" of B., or A. was "to give the whole of his services to B.," it was held that parol evidence was admissible to show in what capacity A. was to serve (Mumford & Gething, 7 C. B. N. S. 305; Price v. Mount, 11 id. 508.), and this, even though the Statute of Frauds required a written contract. Chadwick v. Burnley, 12 W. R. 1077. The object and effect of such evidence is not to alter or vary the meaning of the contract, but rather to develop and ascertain the meaning of the term by ascertaining the sense in which the parties intended to use it. Thus, in a contract for stone at a certain price "per perch," it being doubtful whether 16½ or 25 feet constituted a perch, and the evidence being conflicting, in order to ascertain the intention of the parties, the defendant was permitted to show that the word "perch" was not used by either of the parties, but that they verbally agreed upon 18 cents per cubic foot as the price of the stone, and that the attorney employed to reduce the contract to writing, of his own motion, and without instructions from either party, made the change from feet to perch, and the price from 18 cents per foot to $4.50 per perch, this being the rate if 25 feet is a perch; but if 16½ feet is a perch, the rate would be 27 cents per foot. Quarry v. Clements, 38 Ohio St. 587.

[13] Miller v. Stevens, 100 Mass. 518; Caulkins v. Hellman, 14 Hun (N. Y.), 330; Sweet v. Shumway, 102 Mass. 357; Bateman v. Phillips, 15 East, 272; Shortred v. Check, 1 Ad. & El. 57; Stoops v. Smith, 100 Mass. 63; Gerrish v. Towne, 3 Gray (Mass.), 82; Sargent v. Adams, 3 id. 72. It is well settled that parol evidence is always admissible for the purpose of applying a written instrument to its proper subject-matter. Bennett v. Pierce, 28 Conn. 315; Noonan v. Lee, 2 Black (U S.), 499; Myers v. Ladd, 26 Ill. 415; Cary v Thomson, 1 Daly (N. Y.), 35; Almgren v. Dutilh, 5 N. Y. 28; Mayor v. Butler, 1 Barb. (N. Y.) 325; Waters v. Simmons, 7 Jones (N. C.) L. 541; Hildebrand v. Togle, 20 Ohio, 147; Morgan v. Spangler, 14 Ohio St. 102; Barnhart v. Riddle, 23 Penn. St. 93; Aldridge v. Eshleman, 46 id. 420; Gould v. Lee, 55, id. 99; Ames v. St. Paul, &c., R. R. Co., 12 Minn. 412. Thus, upon the trial of an indictment for the defendant's neglect of duty as overseer of the Cane Hill road, it was held to be error to exclude parol evidence offered to show that the Cane Hill road was the same established by the county court, under a different description. State v. Hapgood, 23 Ark. 553. So, where a tract of land is described differently in different instruments, it may be shown by parol that the different descriptions refer to the same tract, the rule being that extrinsic evidence may properly be resorted to, in order to show the usage of a bus-

its being applied thereto without the aid of such proof.[14] So such evidence is admissible to identify the parties to an instrument or record, as where there are two persons by the same name, to show which was intended;[15] or to show that the payee of notes is not the real party in interest, as that a contract made by A. in his own name, was made as the agent of B;[16] or that goods purchased in his own name were purchased on joint account;[17] or who is the payee in a promise to pay for a charitable purpose;[18] or that a gift, although jointly to husband and wife, was intended to operate only as a gift to the wife;[19] to show that the parties in a former suit are the same as the one on trial;[20] or to show the identity of the parties in one record with those of another.[21] So to show, under a guaranty to "J. H., President," that J. H. is, or was when the writing was executed, the president only of a certain bank, and the guaranty will then enure to that bank.[22] And, generally, where there is sufficient, on the face of negotiable paper, to create a doubt to whom the credit was given, then, as between the original parties, parol evidence is admissible to remove that doubt. Thus, a signature "A. B., captain," on a bill of exchange, not

iness, or the use and nature of certain kinds of property, viewed with reference to its application, or the interests to which it may be subservient. Stewart v. Chadwick, 8 Iowa, 463. So parol evidence has been held admissible to explain a written agreement between a canal company and a farmer, so far as to give identity to the subject-matter of the contract, and to apply it, Bartsch v. Lehigh Co., 4 Rawle (Penn.), 130; to identify a tract described in a conveyance, Hughes v. Sandal, 25 Tex. 162; to identify the articles meant to be conveyed by a bill of sale concluding with the words: "meaning all the farming tools, etc., now owned by him, and on said farm," Rugg v. Hale, 40 Vt. 138; to identify mortgaged wood from other wood piled upon the same lot, Sargeant v. Solberg, 22 Wis. 132; see also Brooks v. Aldrich, 17 N. H. 443; to identify the particular animals intended, under a written contract for the sale of a certain number of hogs, Marshall v. Gridley, 46 Ill. 247; to show the identical monument referred to in a deed, Afferty v. Connover, 7 Ohio St. 99; to identify a note secured by mortgage other than its correspondence with the description given of it in the condition of the mortgage, Melvin v. Fellows, 33 N. H. 401; to show what parcel of land fits all parts of a deed or other instrument, Doe v. Roe, 20 Ga. 689; to identify the subject-matter of a recorded note of a corporation, Pope v. Machias, &c., Co., 52 Me. 535.

[14] Pike v. Fay, 101 Mass. 134; Hart v. Hammett, 18 Vt. 127; Hill v. Rowe, 11 Met. (Mass.) 268.

[15] State v. Weare, 38 N. H. 314; Sawyer v. Boyle, 21 Tex. 28; Walker v. Wells, 25 Ga. 141; Simmons v. Marshall 3 Greene (Iowa), 502; Tuggle v. McMath, 38 Ga. 648.

[16] Lerned v. Johns, 9 Allen (Mass.), 419; Oelrichs v. Ford, 21 Md. 489; Westhaltz v. Retaud, 18 La. An. 245.

[17] Scott v. McKinney, 98 Mass. 344.

[18] Hopkins v. Upshur, 20 Tex. 89.

[19] Dunham v. Catham, 21 Tex. 231.

[20] Shirley v. Fearne, 33 Miss. 653.

[21] Garwood v. Garwood, 29 Cal. 514.

[22] State Bank v. Peck, 28 Vt. 200.

clearly importing a liability of the agent or of the principal, parol evidence by the plaintiff is admissible, the contract being unsealed, to show that it was intended to bind the owner, the principal, and that he had authorized the captain to bind him in that form.[23] So an administration which would be deemed *prima facie* to be granted upon the estate of a father, may be shown to be granted upon the estate of the son, the names of the two being the same.[24] Where a certificate of deposit is taken by a guardian in his own name, parol evidence is admissible, on a settlement of his accounts, to show that the money deposited belonged to the ward, and the certificate is admissible to prove the investment.[25] In an action of ejectment, where the plaintiff claimed under a grant from the State to Elias Nicks and by a grant to himself from Eli Nicks, parol evidence was held admissible to show the identity of the person variously named.[26] So where the name of the vendee in the body of the act of sale was omitted, the notary and one of the witnesses to the act were offered to prove that H. T. W., whose name was subscribed, together with that of the vendor, was the purchaser, and it was held that the omission could be supplied by such parol evidence.[27] The addition to the name signed to a contract, of the official character of the person so signing is such an indication of the representative character of such signer, as will warrant a resort to parol evidence to prove extrinsic circumstances, such as, to whom the consideration passed and credit was given, the agent's authority, etc., by which the respective liability of the principal and agent may be determined.[28]

This species of evidence does not impugn the general rule, because it does not alter or vary the terms of the contract, but merely explains that portion of it which is still in doubt,[29] and enables the court to apply it, according to the real intent of the parties. The circumstance that the language used in a contract, which is susceptible of either of two constructions, was understood in one sense by one of the parties, and in another sense by the other, does

[23] May v. Hewitt, 33 Ala. 161.
[24] Moseley v. Mastin, 37 Ala. 216.
[25] Beasley v. Watson, 41 Ala. 234.
[26] Henderson v. Hackney, 23 Ga. 383.
[27] Beauvais v. Wall, 14 La. An. 199.
[28] Smith v. Alexander, 31 Mo. 193.
[29] Gallagher v. Black, 44 Me. 99. In Graham v. Hamilton, 5 Ired. (N. C.) L. 428, it was held that when a writing is deficient in punctuation, and its sense may be varied as the punctuation is one way or another, extrinsic evidence may be introduced to explain its meaning.

not change the rule. In such a case, the sense in which the word is used in that class of contracts, or in view of the circumstances attending the transaction, must prevail.[30]

Where the terms of a written contract are not perspicuous, but are susceptible of two meanings, parol evidence is admissible to ascertain the intention of the parties,[31] and to that end it is competent to show that the words used have by usage acquired a peculiar meaning different from their ordinary sense, and also to show the circumstances attending the transaction and the situation and admissions of the parties for the purpose of ascertaining the sense in which they intended the language used.[32] Thus, where on the fact of the writing it is doubtful whether a guaranty is continuing, or limited to a single transaction, evidence of the circumstances under which the guaranty was given, the nature of the business in which the credit was to be used, the situation and relation of all the parties, and their previous dealings and negotiations which led to the giving of the guaranty, may be shown to enable the court to ascertain the true intent and meaning of the parties.[33] So, too, where a bill is drawn by a corporation, addressed to its treasurer as an individual, and accepted by him with the addition of treasurer, etc., a sufficient ambiguity is thereby raised as to whether his acceptance was designed to be individual, or in his official capacity, to let in parol evidence to show the fact.[34]

Sec. 15. To correct mistaken description of Devisee.

Where an ambiguity, not apparent on the face of a written instrument, is raised by the introduction of oral evidence, the same description of evidence is admitted to explain it; for example, if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which the testator intended.[1] And where the description of the devisee,

[30] See *post*, § 41 K.

[31] Hueske v. Broussard, 55 Tex. 201; Mason v. Ryas, 26 Kan. 464; Knick v. Knick, 75 Va. 12.

[32] Mason v. Ryas, 26 Kan. 464; Knick v. Knick, *ante;* Hueske v. Broussard, *ante.*

[33] White's Bank v. Meyers, 73 N. Y. 335; 29 Am. Rep. 157; Heffield v. Meadows, L. R., 4 C. P. 595. See also S. P. Bridger v. Pierson, 45 N. Y. 601; Field v. Munson, 47 id. 223; Page v. McDonnell, 55 id. 299; Knapp v. Warner, 57 id. 668.

[34] Lafflin, &c., Powder Co. v. Sinsheimer, 48 Md. 411; 30 Am. Rep. 472; Bradlee v. Boston Glass Co., 16 Pick. (Mass.) 347; Haile v. Pierce, 32 Md. 330.

[1] *Per* GIBBS, C. J., Doe v. Chichester, 4 Dow. 93; Doe d. Morgan v. Morgan, 1 Cr. & M. 235; Goddard v.

or thing devised, is true in part, but not true in every particular, oral evidence is admissible to show the person or thing intended, provided there be enough on the face of the will to justify the application of the evidence.[2] Thus, an error in a Christian or surname may be proved.[3] Where the will named as legatee the "Foreign Missionary Society," evidence of the testator's church affiliations and previous donations was held admissible to show that he intended "The Missionary Society of the Methodist Episcopal Church."[4] A bequest to the "Christian Missionary Society of this State" may be shown by extrinsic evidence to be intended for the "Missionary Society of the Churches of Christ in Indiana."[5]

Where a devise was to S. H., *second* son of T. H., but in fact S. H. was the third son, evidence of the state of the testator's family, and of other circumstances, was admitted to show whether he had mistaken the name or the description.[6] Where a will devises property to be divided equally between two sisters and the children of a brother, parol evidence that the sisters were favorites of the testatrix and that the brother was not is admissible to show that the sisters should take equally with the family of the brother.[7] There are also other authorities for admitting evidence that the testator was accustomed to misname a person, and thus to show who was meant by him, although there be a person in existence whose name corresponds with that in the will.[8] So by "my nephew, J. G.," testator's wife's nephew may be shown to be meant, though the testator also had a nephew J. G.[9] Where the devise was to John A., grandson of T. A., with a charge in favor of "each of the

Bulaw, 1 Nott. & McC. (S. C.) 45; Breeding v. Taylor, 13 B. Mon. (Ky.) 147; Milling v. Crankfield, 1 McCord (S. C.), 258; Clark v. Powers, 45 Ill. 283; Baker v. Talbot, 6 T. B. Mon. (Ky.) 182; Hembell v. White, 2 Overt. (Tenn.) ; Belt v. Miller, 4 H. & J. (Md.) 533; Dorsey v. Hammond, 1 H. & J. (Md.) 201..

[2] Miller v. Travers, 8 Bing. 248-9; Charter v. Charter. L. R., 2 P. & M. 315; L. R., 7 H. L. 364.

[3] Careless v. Careless, 1 Meriv. 384.

[4] Amberson's Estate, 204 Penn. 397, 54a, 484.

[5] Chappell v. Missionary Society, etc., 3 Ind. App. 356, 29 N. E. 924; 50 Am. St. Rep. 276, and note p. 279.

[6] Le Chevalier v. Huthwaite, 3 B. & A. 632.

[7] White v. Holland, 92 Ga. 216; 18 S. E. 17; 44 Am. St. Rep. 87.

[8] Blundell v. Gladstone, 11 Sim. 467; 1 H. L. C. 778; Lee v. Pain, 4 Hare, 251.

[9] Grant v. Grant, L. R., 2 P. & M. 8; Id. v. Id., L. R., 5 C. P. 380; Id. 727; but see Wells v. Wells, L. R., 18 Eq. 504.

brothers and sisters" of the said John A., and it appeared that there were two grandsons of T. A., both named J. A.; held, that oral declarations of the testator were admissible to show which was meant, although it also appeared that only one of the grandsons had *several* brothers and sisters.[10] In the case of a devise to testator's niece, remainder to her three daughters, M. E., and A., the niece at the time of making the will had two legitimate daughters, M. and A., and one illegitimate, E.; held, that the claim of the latter might be rebutted by showing that the niece formerly had a legitimate daughter, E., and that the testator knew nothing of the death of the legitimate, or the birth of the illegitimate, E.[11]

Sec. 16. Party's direct Statements of Intention.

Direct statements of the intention of a party to a solemn document are not admissible to aid in its interpretation unless in case of equivocation where the document applies equally well to two or more persons or things. This exception is well settled in regard to devisees under wills, following an early English case,[1] but its further application has never been clearly defined and it must be limited by the consideration that such evidence does in effect permit the substitution of oral for written acts where the law may require the act to be in writing. Where there are two persons in a town named C. H. Cremer, and one of them is a candidate for office and the other is not, and one of them is commonly called senior and the other junior, it is competent by parol evidence to show that ballots cast for C. H. Cremer were intended to be cast for C. H. Cremer, Sr., but it is not permissible to show that ballots cast for C. H. Cremer, Jr., were intended for C. H. Cremer, Sr.[2] But this rule will not let in oral evidence of the intention of a testator where it can be collected from the will itself who was intended.[3]

It is the general rule that parol evidence of the intention of the testator is inadmissible, but evidence may be admitted to explain

[10] Allen v. Allen, 12 Ad. & E. 451.

[11] Thomas v. Baynon, id. 431.

[1] Note to Lord CHEVEY'S Case, 5 Co. 68. See also Hiscocks v. Hiscocks, 5 M. & W. 363, 369; in the Goods of Peel, L. R., 2 P. & M. 46; Charter v. Charter, L. R., 7 H. L. 364.

[2] State v. Steinborn, 92 Wis. 605, 66 N. W. 798; 53 Am. St. Rep. 938.

[3] Westlake v. Westlake, 4 B. & A. 57; Webber v. Corbett, L. R. 16 Eq. 515.

the circumstances and situation of the testator when the will was executed. So in a certain case in Pennsylvania, where it appeared that the will offered was one which had been republished after having been once canceled, and before the list of legatees was inserted at republication the words "or to their heirs," and after certain legatees the word "deceased" was added it was held that the conversation had with the testator and the suggestions made to him in consequence of which he inserted the words "deceased" and "or to their heirs" was admissible to show that the legacies were not intended to lapse, but to go to the heirs of the deceased legatees.[4] A legacy to a man "free from his present or future debts" was held ambiguous enough to allow the admission of evidence of the intention of the testator that certain notes of the son she held should not be paid.[5] The purpose and intent of a debtor and of a guarantor in procuring a guaranty may be shown as an aid to the construction of the guaranty.[6]

Parol evidence of the oral declarations of the testator as to his intent are inadmissible either as to the persons who take his estate or as to what particular part of the estate any one person is to receive. So, where a will devised property to A. B. in trust, "to be disposed of by him as I have heretofore or may hereafter direct him to do," parol evidence of such directions to the trustee is inadmissible.[7] Parol evidence of direct statements of intention by the testator is not admissible to show that an heir omitted was intentionally omitted.[8] Where a devise was to John H., the eldest son of John H., and it appeared that John H., the father, had an eldest son named Simon, and a son by a second marriage named John; held, that the declarations of the testator were not admissible to show which was meant.[9] Where the devise was to the testator's "nephews," and evidence had been adduced to show that he had no nephews, but that his wife's nephews were meant, it was held that evidence that these could not have been intended by the testator was not admissible, without also showing some other class who were intended to take.[10] Evidence of the intent of the sheriff can-

[4] Gilmor's Estate, 154 Penn. State, 523; 26 A, 614, 35 Am. St. Rep. 855.

[5] Sharp v. Wightman, 205 Penn. 285; 54 A, 888.

[6] Callender McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345.

[7] Heidenheimer v. Bauman, 84 Texas, 174; 19 S. W. 382; 31 Am. St. Rep. 28.

[8] In re Salmon's Estate, 107 Cal. 614, 40 P. 1030, 48 Am. St. Rep. 164.

[9] Hiscocks v. Hiscocks, *supra*.

[10] Sherratt v. Mountford, L. R., 8 Ch. 928.

not be used to aid an imperfect description in a sheriff's deed of real estate.[11]

Where a will offered is claimed to be a forgery, it is the better rule that declarations either oral or written, made by a testator either before or after the date of the alleged will, as to his testamentary intentions are not admissible to show that it was very improbable that he would make a will like that offered, unless the declarations were made near enough to the time of its execution to become a part of the *res gestae*.[12]

A devise to "my dear wife C." cannot be defeated by showing that the devisor had a lawful wife, M., alive when he went through a form of marriage with C.[13] But where B. makes a devise to his wife A., the devise may be defeated by showing that A. fraudulently concealed from B. that she had a husband living when she went through a form of marriage with B.[14] Where a fine was levied of twelve messuages in Chelsea, and it appeared that the cognizor had more than twelve messuages in Chelsea, oral evidence was admitted to show which messuages in particular the cognizor intended to pass.[15]

But whenever the intention of a person is of itself a distinct and material fact it may be proved by his contemporaneous oral or written declarations. A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. After his death there can hardly be any other way of proving it than by his declarations; and while he is still alive his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation. So, on the identity of a dead body claimed to be that of an insured party, declarations of the insured as to his destination when last heard from, just before the finding of the body, are admissible.[16]

The declarations of a party at or about the time he signed certain orders for payment of deposits are admissible to show his in-

[11] Talley v. Schlatitz, 180 Mo. 231; 79 S. W. 162.

[12] Throckmorton v. Holt, 180 U. S. 552, (and list of cases pro and con cited at page 571), 21 S. Ct. 474.

[13] Gains v. Rouse, 5, B. C. 422.

[14] Wilkinson v. Jonghlin, L. R., 2 Eq. 319, following Kennell v. Abbott, 4 Ves. 802.

[15] Bulkeley v. Wilford, Ry. & M. 88.

[16] Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 294. 12 S. Ct. 909.

tention to make a gift. "There is no better proof of intention than declared intention, and it is often the only means of proof."[17]

Sec. 17. To apply Description to Real Estate.

It may be laid down as a general rule, that all facts relating to the subject of a devise or deed, such as that it was not in the possession of the testator, the mode of acquiring it, the local situation and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used.[1] Even the value of the property, and the charges upon it, may be shown in explanation.[2] In construing a will or deed the court should place itself as fully as possible in the situation of the writer, and guide its construction of his intention in some degree by the light of the knowledge thus acquired.[3]

Where a testator apparently intends to devise all his property and he has three pieces of land, two of forty acres each, and he devises forty acres to a son but describes it as in the northeast quarter of a certain section, which he never owned, the word northeast may be struck out and parol evidence admitted to show that the testator had property in the southeast quarter of that section and the court will then construe the will in accordance with the testator's intentions to devise the southeast quarter.[4] If land described in a deed is referred to merely as bounding on land of

[17] Sprague v. Walton, 145 Cal. 228, 78 Pac. 645. The acts and declarations of a testator or an owner about the time of the execution of the will or gift are competent not for the purpose of showing the truth of the matters contained in the declarations but as throwing light upon the mental condition or intention of the declarant, so where an administrator brought suit for the conversion of a note claimed by the defendant to be given to him by the intestate evidence of remarks made by the intestate about the time of the alleged gift "that he could put Moore (the defendant) through for it and shut him up" and that the defendant was a rascal are admissible with other evidence to show the intestate's intention in the transaction. Lane v. Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430.

[1] PARKE, J., Templeman v. Martin, 4 B. & Ad. 785; Webber v. Stanley, 16 C. B., N. S. 698; Wigram on Interp. Wills. See § 40, *post*.

[2] The situation of the parties and surrounding circumstances at the time of the execution of a deed may be shown to explain the meaning of the words "claims of any and every description." Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. Nightingall v. Smith, 1 Exch. 879; see also Allgood v. Blake, L. R., 8 Ex. 160.

[3] Hill v. Crook, L. R. 6, H. L. 265, 277; Charter v. Charter, L. R., 7 H. L. 364, *per* Lords CAIRNS, C., and SELBOURNE.

[4] Whitcomb v. Rodman, 156 Ill. 116, 40 N. E. 553, 47 Am. St. Rep. 181.

the grantor parol evidence is admissible to show that at the time of the conveyance the gantor pointed out to the grantee the boundaries of the land conveyed and they subsequently jointly built a fence enclosing it.[5] Where the description of a lot of land conveyed begins with the north corner of a certain lot and it appears that this lot has two "north corners," evidence is admissible that if one "north corner" is taken as the starting point of the description land of the grantor will be included, while if the other "north corner" is taken no land of the grantor will be included.[6] So in a case where an owner of a large tract of land deeded to a church a lot from one corner three-fifths of an acre in size and executed another deed of the whole tract to another party reserving "one acre out of the northwest corner deeded to" the church, the owner does not retain title to two-fifths of an acre outside of the portion deeded to the church. A description of an acre or other definite quantity in the corner of a particular tract may ordinarily be held to mean such quantity lying in square form in the corner named, but here the description showed that the only land excepted was the lot actually granted to the church, which the church had enclosed.[7] Where a lot of land is described as on Green street, about 20 feet front, and running back 36 feet, adjoining Adams' drug store, parol evidence may be used to show that there never was but one Adams drug store on Green street and no other lot of that size adjoining it.[8] In the same way a description of an acre of land in a deed situated on a certain road "on which a schoolhouse is to be built" may be explained by evidence that certain land was surveyed and cleared for the purpose of erecting a schoolhouse, that the schoolhouse was subsequently erected there and that the grantor owned no other acre in that vicinity upon which a schoolhouse was to be built.[9] The sale of "sundry orchards in Ontario and Cucamonga" may be explained by parol proof of the orchards included.[10]

Where a deed of trust is general in its terms and does not de-

[5] Hooten v. Comerford, 152 Mass. 591, 26 N. E. 407, 23 Am. St. Rep. 861.

[6] Hereford v. Hereford, 134 Ala. 321, 32 So. 620.

[7] Mayberry v. Beck (Kan. 1905), 81 Pac. 191. To the same effect see Lego v. Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706.

[8] Pearson v. Adams, 129 Ala. 157, 29 So. 977.

[9] Cottingham v. Hill, 119 Ala. 353, 24 So. 552, 72 Am. St. Rep. 923.

[10] Ontario, etc., Association v. Cutting, etc., Co., 134 Cal. 21, 66 P. 28, 86 Am. St. Rep. 231.

scribe the land conveyed by courses and distances, evidence *aliunde* may be competent to explain it.[11] But in a suit to enforce performance of a contract of sale of "your lot," parol evidence is inadmissible to identify the land where it appears that the seller has three lots of land in the same town. This decision was reached notwithstanding a statute providing for the introduction of parol testimony to identify land sued for.[12] Parol evidence of acts and conversation of the parties prior to the delivery of a deed, to show that it was not intended to affect certain restrictions, is inadmissible.[13] Where a conveyance covered certain coal underlying premises described by metes and bounds, evidence that only a certain vein of coal was intended was held to be properly excluded.[14] A deed containing a particular description of land conveyed cannot be varied by evidence of a prior agreement as to the boundary although the parties occupied in accordance with this agreement.[15]

With respect to the description of property conveyed the rule of construction is the same whether the deed be made by a party in his own right or by an officer of the court.[16]

Where a subject-matter exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object. Thus, where a testator devised his "estate at Ashton," it was held that oral evidence was inadmissible to show that he was accustomed to call all his maternal estate "his Ashton estate," there being an estate in the parish of Ashton which was sufficient to satisfy the devise.[17] But a devise of lands "in parish D." will pass lands of which *part* only is in D., if it be shown by oral evidence that all was reputed to be in it.[18] Where words have acquired a precise and technical meaning, no other meaning can be applied to them.[19] In the case of a legacy

[11] Perry v. Elliott, 101 Va. 709, 44 S. E. 919.

[12] Farthing v. Rochelle, 131 N. C. 563, 43 S. E. 1.

[13] Vihlein v. Mathews, 172 N. Y. 154, 64 N. E. R. 792.

[14] King v. New York & C. Gas Co., 204 Penn. 628, 54 A. 477.

[15] Duggan v. Uppendahl, 197 Ill. 179, 64 N. E. R. 289.

[16] White v. Luning, 93 U. S. 514, 23 L. Ed. 938.

[17] Chichester v. Oxendum, 3 Taunt. 147; S. C. Dom. Pro., 4 Dow, 65; Webber v. Stanley, *supra;* Pedley v. Dodds, L. R., 2 Eq. 819. See, also, Carruthers v. Sheddon, 6 Taunt. 14.

[18] Anstee v. Nelms, 1 H. & N. 225; Whitfield v. Langdale, 1 Ch. D. 61.

[19] *Per* Lord KENYON, Lane v. Earl of Stanhope, 6 T. R. 352.

to the testator's "heir," it cannot be shown that a testator was in the habit of calling a person his heir who was not so.[20]

Sec. 18. Patent Ambiguity or Indefiniteness.

It was formerly said that where the ambiguity is not latent, or raised by extrinsic evidence, but patent or apparent on the face of the instrument, oral evidence is not admissible to explain such ambiguity. But this rule is really only a statement of the rule that where the substantive law requires a matter to be expressed in writing parol evidence will not be admitted to fill gaps in it. But the writing, so far as expressed, can always be viewed through the eyes of the parties who wrote it, in view of their situation, whether the ambiguity is apparent upon the face of the instrument or not.[1] Thus, where a blank is left for the devisee's name in a will, oral

[20] Mounsey v. Blamire, 4 Russ. 384. Where the question is as to what the writing applies, oral evidence is admissible to explain it. Thus, where a testator devised "all his farm called Trogues Farm," it was held that it might be shown of what parcels the farm consisted. Radford v. Southern, 1 M. & S. 299. But where a deed professes to convey a farm as described on a schedule and map annexed, a field not included in the map or schedule, though always treated as part of the farm, will not pass. Barton v. Dawes, 10 C. B. 261. Where the testator devised two cottages, one described as being in the occupation of A., and the other of B.; and it appeared that the testator had two cottages which had been internally divided, so that part only was occupied by A., and part of the other occupied by B.; it was held that only the portions of the cottages so occupied passed by the devise, and oral evidence was not admissible to show that he meant the entire cottages to pass. Hubbard v. Hubbard, 15 Q. B. 227. Where a lease professed to demise premises and a yard, extrinsic evidence was admitted to rebut the presumption that a cellar under the yard was also intended to pass. Freeland v. Burt, 1 T. R. 701. So in case of a written agreement to convey "all those brick-works in the possession of A. B.," oral evidence of what passed on making the agreement was admitted to show what brick-works were intended to pass. Paddock v. Fradley, 1 C. & J. 90. Although the question of parcel or no parcel is for the jury, the judge must tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question. Lyle v. Richards, L. R., 1 H. L., 222. Conditions of sale, shown to a purchaser at the time of sale, are evidence against him of what was then reputed to be a part of the premises conveyed to him by the deed. Murly v. McDermott, 8 Ad. & E. 138. But they will not narrow the language of the conveyance. Norton v. Webster, 12 Ad. & E. 442. See, also, Glave v. Harding, 27 L. J., Ex. 286.

[1] "Bacon's maxim was an unprofitable subtlety. In truth, the only patent ambiguity that was not open to explanation by extrinsic matter was one that, in the nature of things, was not capable of explanation. . . . Generally speaking, ambiguities, or any other difficulties, patent or latent, are all alike as regards the right and duty to compare the documents with extrinsic facts, and as regards the possibility that they may vanish when this is done." Thayer's Preliminary Treatise on Evidence, 424, 425.

evidence cannot be admitted to show whose name was intended to be inserted.[2] Where the names of the devisees in a will of real property were all indicated only by single letters, a card kept by the testator separate from his will, containing "a key" to the letters, and showing the person meant by each, was held inadmissible to explain it, though referred to in the will.[3] But where a blank was left for the Christian name only, oral evidence was admitted to prove the individual intended.[4] So, if a legacy gives to a legatee a sum expressed by the figure 5 following the dollar sign and before a considerable space in which appear somewhat above the line two ciphers, a patent ambiguity appears, whether the testator intended to give five dollars or five hundred. But this is not the kind of patent ambiguity which cannot be explained by parol, and parol evidence of the situation of the parties and of the purpose of the testator in inserting the legacy is admissible.[5] A contract of fire insurance reading "for the term of three years from the fourteenth day of January, 1903, at noon, to the fourteenth day of January, 1904, at noon," can be explained by parol evidence to show what the contract really was.[6]

[2] Baylis v. Atty.-Gen., 2 Atk. 239; Webster v. Atkinson, 4 N. H. 21.

[3] Clayton v. Nugent, Ld., 13 M. & W. 200.

[4] Where a power of attorney is made to Conrad Krebs and ———— Krebs parol evidence is admissible to show the Christian name omitted. La Vié v. Tooze, 43 Ore. 590, 74 Pac. 210; Price v. Page, 4 Ves. 680. But see Doe d. Gord v. Needs, 2 M. & W. 139.

[5] Schlottman v. Hoffman, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527.

[6] Traders Ins. Co. of Chicago v. E. D. Edwards Post No. 22, G. A. R. (Miss., 1905), 38 So. 779.

So in case of a devise "to Mrs. G., the Chancellor referred it to the Master to receive evidence to show the person intended, who found that the testator invariably called a Mrs. Gregg by the name of Mrs. G." Abbott v. Massie, 3 Ves. 148. Where a will mentioned George, the son of *George* Gord, and also George, the son of *John* Gord, a bequest to "George, the *son of Gord*," was explained by proof of the declarations of the testator to mean George, the son of *George* Gord. Gord v. Needs, 2 M. & W. 129. In reply to the argument that this was a *patent* ambiguity, it was said that it could only appear ambiguous by showing *aliunde* the non-existence of a George, the son of Gord, different from the other two Georges; and that the mention of another George in the same will had no other effect than extrinsic proof of the same fact would have had.

If an agreement, unambiguous on the face of it, is shown by extrinsic evidence to have a different meaning from that which it imports, and the extrinsic facts are undisputed, the construction of it is for the judge, who ought not to leave it to the jury as a question of the intention of the parties. Hitchin v. Groom, 5 C. B. 515.

Where a blank is left in a written agreement which need not have been reduced into writing, and would have been equally binding if written or unwritten (as if the agreement be to deliver goods to the value of less than 10*l.*, and a blank be left for the quantity of goods to be delivered),

Many cases hold that it is not admissible to explain a patent ambiguity,[7] or an ambiguity which appears upon the face of the instrument, and shows that something is omitted which must be added before the meaning of the parties can be ascertained. Thus, where a memorandum as follows: "B. takes C.'s Ohio and Miss. for 5,100 and odd dollars, to be ind. on C.'s note on date of sale," was relied on, it was held that parol evidence was not admissible to vary it, there being no dispute as to the specific note or stock meant, or the meaning of the abbreviations.[8] So, a contract in writing as follows: "I hereby agree to take 500 lbs. of sugar of B., and pay him therefor *ten* per pound," contains a patent ambiguity, and parol evidence is not admissible to show that ten *cents* was the price agreed on, consequently no action could be maintained upon the contract.[9]

Where the words of an instrument are so indefinite as to convey no certain meaning the court will not admit parol evidence of its intent and thus enable an act to be done by parol which the law requires to be in writing. So, the words in a deed "*littoral* or aquatic" rights are too indefinite for consideration and parol evidence as to the intention of the parties that they should cover certain rights in oyster beds is inadmissible.[10] A description in a deed, "all that tract or parcel . . . containing 275 acres, it being

in such a case it would seem that in an action for the non-performance of the contract, oral evidence may be admitted to supply the defect. Phill. Ev. 521. An instrument so imperfect on the face of it is no perfect contract at all so as to exclude oral evidence. As to the effect of ommissions in a contract within the Statute of Frauds, see *post, Action for not accepting goods.* Where, in the entry of an appointment to a curacy in the bishop's register, a blank was left for a patron's name, it was held that this might be supplied by oral evidence. Meath, Bp. of, v. Belfield Ld., 1 Wils. 215. A demise offered in evidence was a printed blank form filled up and altered for use; held, that the court might look at the parts struck out in order to ascertain the intent of the parties in what remained. Strickland v. Maxwell, 2 Cr. & M. 539.

[7] Panton v. Tefft, 22 Ill. 366; Richmond Trading, &c., Co. v. Farquar, 8 Blackf. (Ind.) 89; Bowyer v. Martin, 6 Rand. (Va.) 525; Morris v. Edwards, 1 Ohio, 184; Johnson v. Bullen, 2 Port. (Ala.) 29; Betts v. Demumbrune, Cooke (Tenn.), 39; Mithoff v. Bryne, 20 La. An. 363.

[8] Colt v. Cone, 107 Mass. 285.

[9] In Clements v. Taylor, 65 Ala. 363. a certificate signed by the clerk of the U. S. district court officially, with the seal of the court affixed, which stated "that the foregoing pages, numbered from 1 to —, both inclusive, contain a full, true and complete transcript of all the proceedings in the matter of A. B,, bankrupt, as the same appears of record, and on file in my office," not describing or identifying the papers included in the transcript, was held fatally defective, since, on account of the blank the court could not tell what entries and papers were intended to be certified.

[10] Barateria Canning Co. v. Ott, 84 Miss. 737, 37 So. 121.

part of the lot 270, and part of lot 271, and part of lot 274 and part of lot 272, all in the 17the district of Harris County," was held too vague and indefinite to be aided by parol evidence and not admissible as "color of title."[11] Where an oral contract to convey real estate covered simply "100 acres off of the west end of the land," it is too indefinite to be enforced and the land to be conveyed cannot be identified by parol.[12] A phrase in a lease for one year, "with privilege of longer," is too vague and uncertain to constitute a binding covenant and cannot be explained by parol.[13] Parol evidence is not admissible to explain the words in a mortgage, "seventy, more or less, of corn in a field," as this is not a defective description, but no description at all, and intrinsic evidence is not admissible to insert the property intended to be but not in fact covered thereby.[14]

Sec. 19. Conduct of Parties at the time of and after Execution of Writing.

The *general* rule excludes all parol evidence in reference to written contracts, which tends to alter, vary or control their terms; and this extends even to the exclusion of what was said or done by the parties thereto before, at the time of, or just after, the making of the contract. The entire agreement of the parties—in the absence of fraud or mistake—is regarded as being merged in the writing itself; and when there is no *latent* ambiguity therein, the writing must speak for itself, and be construed without resort to extrinsic evidence. But, when the meaning and intent of the parties to the instrument cannot be reasonably gathered from its language, as where words are used, the ordinary meaning of which, applied to the contract, would be senseless; or where the instrument is susceptible of two constructions essentially different from each other, as well as in numerous other instances, parol evidence of what was said or done by the parties at the time of the making of the contract; or a condition of things in the locality where the contract was made, in reference to which the contract was made, may be given in evidence really as a part of the *res gestae,* not to alter or vary the contract itself, but to explain it, and

[11] Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691.

[12] Knight v. Alexander, 42 Ore. 521, 71 Pac. 657.

[13] Howard v. Tomicich, 81 Miss. 703, 33 So. 493.

[14] Augustine v. McDowell, 120 Iowa, 401, 94 N. W. 918.

ascertain the real intention and purpose of the parties thereto. Thus, in an action on an alleged contract to leave property by will, the attitude and dealings of the parties during the whole time between the making of the alleged contract and the death of the decedent are material as part of the *res gestae*.[1] So, where the meaning and application of a written contract cannot be ascertained from the *instrument itself*, parol evidence may be given to explain its true intent and meaning;[2] and this, whether the ambiguity arises from the contract itself, or the mode of executing it[3] and facts existing at the time of making the contract, to which the words employed in it relate, may be proved as a solution of the real intent, purpose and meaning of the parties;[4] as that a contract for the payment of money was made with reference to Confederate money.[5] The circumstances attending the transaction, and what was said and done by the parties while engaged in the act of execution, may be resorted to, not to vary, but to explain and apply the contract,[6] and show the real intention of the parties;[7] but a party cannot, even when there is an ambiguity, be allowed, in the absence of fraud, to swear to what his *understanding* of the matter was, unless the other party understood the matter the *same way*,[8] A grantor in a deed may show as part of the *res gestae* his objections to signing a certain deed in a certain way in order to rebut the presumption as to title arising from such signature.[9]

[1] Burns v. Smith, 21 Mont. 251, 53 P. 742, 69 Am. St. Rep. 653.

[2] De Wolf v. Crandall, 1 Sweeney (N. Y.), 556; Suffern v. Butler, 21 N. J. 410; Sweet v. Shumway, 102 Mass. 365; Iron City Commercial College v. Kerr, 3 Brewst. (Penn.) 196; Howlett v. Howlett, 56 Barb. (N. Y.) 467; Arthur v. Roberts, 60 id. 580; Robinson v. United States, 13 Wall. (U. S.) 363; Harris v. Rathbun, 2 Abb. App. (N. Y.) 426.

[3] Haile v. Pierce, 32 Md. 327; Richmond R. R. Co. v. Snead, 19 Gratt. (Va.) 354.

[4] Richards v. Schlagelmick, 65 N. C. 150; Donley v. Tindall, 32 Tex. 43.

[5] Thornington v. Smith, 8 Wall. (U. S.) 12; Donley v. Tindall, *ante*.

[6] Foster v. McGraw, 64 Penn. St. 464; Field v. Munson, 47 N. Y. 221; Ins. Co. v. Thorp, 22 Mich. 146; Goodrich v. Stevens, 5 Lans. (N. Y.) 230; Bambridge v. Wade, 20 L. J. (Q. B.) 7; Grant v. Lathrop, 23 N. H. 67; Knights v. N. E. Worsted Co., 2 Cush. (Mass.) 271; Spencer v. Babcock, 22 Barb. (N. Y.) 326; Conner v. Carpenter, 28 Vt. 237; Emery v. Webster, 42 Me. 204; Ratcliff v. Allison, 3 Rand. (Va.) 537; Carmony v. Hooper, 5 Penn. St. 305; Black v. Columbian Ins. Co., 42 N. Y. 393; McGuire v. Stevens, 42 Miss. 724; Acker v. Bender, 33 Ala. 230; Sigerson v. Cushing, 14 Wis. 527; Cross v. Pearson, 17 Ind. 612; Halstead v. Meeker, 15 N. J. 136; Haideman v. Chambers, 19 Texas, 1.

[7] Venzan v. McGregor, 23 Cal. 339; Ohio, &c., R. R. Co. v. Middleton, 20 Ill. 629; Hinnmann v. Rosenback, 39 N. Y. 98; Farmers' Bank v. Winfield, 24 Wend. (N. Y.) 419; Lowrey v. Adams, 22 Vt. 160; Donnell v. Simonton, 13 Minn. 301.

[8] Dalano v. Gorham, 48 N. H. 203.

[9] State v. Andrews, 39 W. Va. 35, 19 S. E. 385, 45 Am. St. Rep. 884.

So, where a contract is silent as to the time or mode of payment, parol evidence may be given to establish the understanding or agreement of the parties in that respect; and the same is true when any essential feature or part of the contract has obviously been omitted;[10] as, where a person has sold the good will of a business, in what place his business was located;[11] or to show the *actual* or an additional consideration of a contract or deed, when the terms of the bargain are not specifically stated,[12] or to identify property described in it, whether real or personal;[13] or to show that a sale mentioned in a written agreement was made by sample, and whether or not the articles tendered correspond therewith;[14] or the purpose for which a note was given, when not inconsistent with its terms;[15] or for whose benefit a contract was made;[16] or that it was executed upon condition that some other person should sign it;[17] or when fraud is claimed, or any breach of warranty in an action upon an insurance policy, upon the ground that the building was used for purposes more hazardous than those in the class in which it was rated, proof is admissible to show that the insurers knew the structure and the uses to which it was devoted;[18] or when only a part of the agreement has been reduced to writing and it rests partly in parol;[19] so any distinct valid parol contract between the parties, made at the same time and not reduced to writing, which is not in conflict with the terms of the written contract, and which operated as an inducement to either of the parties to enter into the original agreement;[20] but this must not be understood as authorizing the proof of any parol agreement so made, to in any wise vary, enlarge or control the terms or provisions of the written contract.[21]

[10] Paul v. Owings, 32 Md. 402; Donley v. Tindall, 32 Tex. 43.

[11] Warfield v. Booth, 33 Md. 63.

[12] Pierce v. Brew, 43 Vt. 292; Nedvidek v. Meyer, 46 Mo. 600; Landerman v. Ingraham, 49 id. 212; Perry v. Smith, 34 Tex. 277; Booth v. Hines, 54 Ill. 363.

[13] Hutton v. Arnett, 51 Ill. 198; Bancroft v. Grover, 23 Wis. 463.

[14] Pike v. Fay, 101 Mass. 134; Stoops v. Smith, 100 id. 63; Sweet v. Shumway, 102 id. 365.

[15] Collins v. Gilson, 29 Iowa, 61; Kimball v. Myers, 21 Mich. 276; Hutchins v. Hubbard, 34 N. Y. 24.

[16] Lancey v. Phenix, &c., Ins. Co., 56 Me. 562; Washington Ins. Co. v. St. Mary's Seminary, 52 Mo. 480.

[17] Robertson v. Evans, 3 S. C. 330; Butler v. Smith, 35 Miss. 457.

[18] Mayor, &c., of N. Y., v. Exchange Ins. Co., 3 Abb. App. (N. Y.) 261.

[19] Webster v. Hodgkins, 25 N. H. 128; Barker v. Bradley, 42 N. Y. 316; Winn v. Chamberlain, 32 Vt. 318; Crane v. Elizaebth, &c., Asso., 29 N. J. 302.

[20] Bonney v. Merrill, 57 Me. 368.

[21] Vandecar v. Thompson, 19 Mich. 82; Proctor v. Gilson, 49 N. H. 62; Buzzell v. Willard, 44 Vt. 44; Basshor v. Forbes, 36 Md. 155; Weaver v. Fulsher, 27 Ark. 510; Smith v. Dallas, 35 Ind. 255.

Where the defendant signed with the plaintiff a definite contract for driving logs, a suggestion made at the time by the plaintiff to the defendant that he conceal some of the logs from the sealer is not part of the *res gestae* on the issue of fraud in the inception of the contract.[22]

[22] McLeod v. Johnson, 96 Maine, 271, 52 A. 760. The application, force and extent of this exception to the rule is well illustrated by a case decided in the Supreme Court of Pennsylania (Shugart v. Moore, 1 Weekly Notes of Cases, 598, 599) under the following state of facts: The plaintiff went into possession of defendant's farm under a written lease, by the terms of which he was to cultivate the farm upon shares. There was no barn upon the premises suitable to store the crops in, and there was no provision in the lease in reference to the building of a new one; but the plaintiff offered to prove upon the trial, that before the first of April, 1869, the defendant proposed that if he (the plaintiff) would lease and move on to his (the defendant's) farm for a year, as a *cropper*, he (the defendant) would build a barn thereon by harvest time; that when the defendant brought the agreement to him to sign he at first refused to sign it, because it did not mention that the defendant was to build the barn; that the defendant then said that that was not necessary, as he was a man of his word and would do as he had agreed, whereupon the plaintiff signed the agreement and entered into the possession of the farm; but the defendant neglected and refused to build the barn. Upon the trial of the case in the lower court the judge refused to admit the evidence of the foregoing facts, but the Supreme Court held that the evidence was admissible. SHARSWOOD, J., said: "The cases of Weaver v. Wood, 9 Penn. St. 220, and Powelton Coal Co. v. McShain, 74 Penn. St. 238, are full to the point that the evidence should have been admitted. These cases settle, beyond all question, that when a promise is made by one party, in consideration of the execution of a written instrument by the other, it may be shown by parol evidence."

The same doctrine was applied in the case of Lindley v. Lacey, 17 C. B. (N. S.) 578. In that case it was held that where, in negotiating the sale of the good will and fixtures of a business, the purchaser promised that, in consideration of the vendor's signing the agreement, he would settle a suit of a third party pending against the vendor, that parol evidence of such agreement was admissible, *even though the written agreement authorized the purchaser to settle the suit out of the purchase-money.* In Baker v. Mich. Cent. R. R. Co., 42 Ill. 73, the plaintiff shipped eighty tierces of hams over the defendants' road, in reference to the shipment and transportation of which he made an oral agreement with the defendants, through their agent, that the freight should not be subject to the restrictions upon the carriers' liability applied to less perishable goods. The bill of lading contained this restriction, but the court held that the agreement between the parties might be shown by parol evidence in rebuttal of the bill of lading in that respect. In Silliman v. Tuttle, 45 Barb. (N. Y.) 171, the plaintiffs bought of the defendants a canal boat. The price was agreed upon, and a bill of sale executed and delivered. The boat was then on a trip transporting merchandise, and it was agreed, by parol evidence, between the parties, at the time of the sale, that the plaintiffs should have the avails of the trip, upon payment of the expenses thereof. The bill of sale was silent upon this matter, and the title and right of possession passed on delivery of the bill. It was held by the court that this was an independent contract, relating to the earnings of the boat, and not to the boat itself, and having no necessary connection with

Sec. 20. To explain or vary Legal Effect of unambiguous Writing.

Parol evidence is never admissible to explain a written contract or show the intention of the parties when the contract is free from

its sale, and that parol evidence was admissible to establish it, and that its establishment did not, in any wise, interfere with, alter, vary or control the bill of sale.

So evidence is admissible when it only tends to establish a contract supplemental to the written contract. Thus, in Malpas v. London, &c., R. R. Co., L. R., 1 C. P. 336, the plaintiff made arrangements orally with the defendants to convey cattle for him to E. on their railway, and thence to K. on a connecting line, and at the same time, without noticing its contents, signed a consignment note by which the cattle were directed to be shipped to E. It was held that evidence was admissible to prove the parol agreement to transport the cattle from E. to K., as such agreement did not conflict with the consignment note, but was merely *supplemental* thereto. That collateral parol agreements relating to the subject-matter of the contract, but entirely independent of the contract itself, and not intended to qualify or control it, may be given in evidence, and may be made the ground of an action, or, in a proper case, set up as a defense to the instrument itself, is established by numerous authorities. Buzzell v. Willard, 44 Vt. 44; Morrill v. Waterson, 7 Kan. 199; Wesbrook v. Jeffers, 33 Tex. 86. But the contract must be an independent one, and such as could properly be made by parol, and as is not repugnant to the provisions of the written agreement; that is to say, it must not be such a contract as in any wise qualifies, limits or controls the written instrument itself, or its effect, application or construction. Thus it has been held incompetent to introduce evidence of a parol agreement, that the deed of a certain piece of land should pass the manure then on the premises, because such an agreement would qualify or extend the provisions of the instrument, and add to its effect, and control its legal construction; because the question as to whether the manure passed by the deed is purely one of law, depending upon a variety of questions. Proctor v. Gibson, 49 N. H. 62.

On a question whether a deputy sheriff acted negligently or unfaithfully in not making an arrest of one S., evidence was received that he inquired at S.'s place of residence, called at his shop, inquired of a man and boy, who told him S. was at his house, where he went and inquired for him of a woman whom he learned was S.'s wife, mentioning to her his business. She told him that her husband was then at work at the shop. The evidence of these answers was objected to as hearsay, and excluded; but a new trial was granted. The court said it was a material point whether the officer made due search and inquiry. It was his duty to inquire at all proper places, and search wherever it was probable S. would be found. To show this, it was necessary he should state the inquiries and the answers made, and that he had made search accordingly. Such answers are part of the transaction. They are facts, and do not stand on the footing of hearsay evidence. Phelps v. Foot, 1 Conn. 387; Ponsonby v. Debaillon et al., 6 Mart. (La.) Rep. 238. The defendant, as deputy sheriff, seized a lot of wool and other property, under an execution against S., as his property. The plaintiff had delivered wool to S. to be manufactured; and before the seizure, on inquiring of S. at his factory as to his progress, S. showed the plaintiff the wool, yarn and bocking, which he said were the plaintiff's, who then examined them. S. afterwards absconded, and the goods were seized. These declarations of S. were offered in evidence, and held admissible, the court saying: "As a mere declaration, this is not evidence; for though S. is out of the

doubt, and such evidence gives to the contract an effect different from that which arises from a fair construction of the language used, or gives an advantage to one party, or adds a burden to the other, which, except for such evidence, would not exist. The

country, his sayings should be rejected as hearsay. It is a difficult case of the *res gestae*. The property was in possession of S., and difficult to be distinguished from other property of the same kind also in his possession. If the saying had been without the parties being engaged in any act, it would have been mere hearsay. *But here was an act.* It was like labeling the goods with the owner's name. Showing the property to the plaintiff as his wool, on his going and inquiring, in different stages of process, was an act or transaction, and is like an actual separation from the common mass. Pool v. Bridges, 4 Pick. (Mass.) 378.

Although, on the trial of an indictment for manslaughter, malice cannot be shown on the part of the prosecution, yet declarations made by the prisoner, at the commencement of, and during the fatal affray, as well as immediately before and after it, must be received as constituting a part of the *res gestae;* and this although they may incidentally tend to show malice. State v. Powell, 7 N. J. L. 244. In this case, the parties being shown together quarreling immediately *before* the fatal blow, a witness was allowed to state that, in the course of the quarrel, the prisoner threatened that he would kill the deceased before he went to sleep. Indeed, malice may be quite material; for should plain murder be made out, the court might, in its discretion, discharge the jury, and order a higher indictment to be preferred. In an action for a libel, what a third person told the defendant as to its truth before the defendant published the libel, was offered in proof to mitigate damages, and was held receivable. Coleman v. Southwick, 9 John. (N. Y.) 45; Kennedy v. Gregory, 1 Binn. (Penn.) 85; Morrison v. Duane, 1 id. 90.

In a settlement cause, on a question whether C., the grandfather, had made a gift of a slave to his granddaughter, it was proved by the defendants that he requested her to be brought up so as to be useful to his granddaughter when married, to whom he intended to give her, and that F., who married the granddaughter, came and took the slave, saying that she had been given to his wife by her grandfather. And this evidence was held admissible as part of the *res gestae.* The court said the change of possession was established. The declarations of the parties went to show the intent with which the change was made. On *scire facias,* to enforce a recognizance against a house on which, with other real estate, it had been charged by K., the cognizor, the defendant, claiming under K., sought to raise an inference of payment from the fact of the *cestui que trust* of the plaintiff having released some of the land charged, and especially a tract sold by K. to Fisher. In reply to this, the plaintiff offered K.'s letter in evidence, requesting such release, on the ground that there was other property out of which satisfaction could be obtained. This was objected to as *res inter alios acta,* but it was held admissible, as completely repelling the inference of payment, so far as it was derivable from the circumstances of the release. Reigart v. Ellmaker, 10 S. & R. 27. In an action against a surety on a bond for money, he insisted that he was discharged by the plaintiff's laches. The plaintiff, to show that the surety was indemnified, offered to prove that his principal had delivered a note to a witness, *telling him it was for his* surety, and that it was to secure him; and that the note was delivered to the surety, who collected it. The declarations of the principal were holden admissible in evidence as part of the *res gestae.* Deardorf v. Hildebrand, 2 Rawle (Penn.) 226. Upon a trial for larceny, it appeared that the prosecutor, on his return from search, declared himself satisfied of

mere assertion by a party to a written contract that uncertainties and ambiguous statements exist in it will not afford a basis for the introduction of parol evidence when on a perusal of the writing the court cannot find any equivocal language employed.[1] Parol evidence is not admissible to explain the words of a contract made in ordinary popular language, and so it is not admissible to show that the words in a deed to a railroad "legitimate railroad purposes" were not intended to include a hotel or eating house.[2]

the prisoner's innocence, having found his watch in his waistcoat pocket; and directed the driver to turn about. The prosecutor being absent, his declarations were received for the prisoner as a part of the *res gestæ*. Kelly's case, 3 C. H. Rec. 153. In an action for breach of a marriage promise, the defendant may show by a third person, in order to mitigate damages, that his father declared to him his dislike of the match, on account of the plaintiff's bad character. It appeared that the father was an incompetent witness, having employed the defendant's attorney. Irving v. Greenwood, 1 C. & P. 350. In a writ of entry against a grantee of S., which grantee had notice of a prior deed from S., under which the defendant claimed, it was alleged that S. had fraudulently obtained and suppressed the first deed; and to show this, it was in proof that he obtained access to the desk of the first grantee under pretense of searching for other papers. It was held that his declarations, while at the desk, going to identify the deed as one of the papers which he took away, and to show its contents, were admissible in evidence as part of the *res gestae* against the tenant. Davis v. Spooner, 3 Pick. (Mass.) 284.

There are certain facts which can only be proved by the acts or declarations of a party, as that he could write, or read, or knew the multiplication table, etc. Darby v. Rice, 2 N. & McCord (S. C.), 596.

[1] Atchison, T. & S. F. R. Co. v. Truskett, 67 Kan. 26, 72 Pac. 562.

[2] Abraham v. Oregon, etc., Railroad Co., 37 Ore. 495, 60 P. 899, 82 Am. St. Rep. 779.

Thus, where an agreement in writing was entered into between A. and B., that A. should have the product of "Borenam meadow," it was held that A. could not prove that it was at the same time agreed orally that he should also have the produce from both Milcroft and Boreham meadow. Alines v. Ansell, 3 Will. 275; Angel v. Duke, 32 L. T., N. S. 320; Hope v. Atkins, 1 Price, 143. So, where a note is payable on demand, parol testimony is not admissible to show that it was agreed that it should not be payable until a given event happened (Moseley v. Hunaford, 10 B. & C. 729; Besant v. Cross, 10 C. B. 895; Adams v. Woodley, 1 M. & W. 374), or to show that a note, payable on a day certain, was to be paid on a contingency only (Ramsean v. Walker, 1 Stark. 361; Foster v. Jolley, 1 C., M. & R. 703; S. B. Morrison v. Lovejoy, 6 Minn. 319; Hatch v. Hyde, 14 Vt. 25; Swank v. Nichols, 24 Ind. 199; Farnham v. Ingham, 5 Vt. 514; Schurmier v. Johnson, 10 Minn. 319; Smith v. Thomas, 29 Mo. 307; Fay v. Blackstone, 31 Ill. 538; Carrier v. Hale, 8 Allen [Mass.], 47. Or to extend or vary the time of payment. Inge v. Hana, 29 Mo. 399; Brown v. Wiley, 20 How. [U. S.] 442; Eaton v. Emerson, 14 Me. 335; Joyner v. Turner, 19 Ark. 690; Cowles v. Townsend, 31 Ala. 133. And the same rule applies to bills of exchange. Mason v. Graff, 35 Penn. St. 445. Or that one set of written instructions superseded another, Dunlap v. Monroe, 7 Cr. (U. S.) 242; or that the party should have what the written instrument said he should not have, Jones v. Parmer, 11 Paige (N. Y.) Ch. 650; Osborn v. Hendrickson, 7 Cal. 282, or to in-

So oral evidence is inadmissible to alter the legal effect and construction of a written agreement. Thus, parol evidence of a verbal agreement between a husband and wife giving her equal rights in land conveyed to both of them, is inadmissible as changing the legal effect of the deed, which was to create a tenancy by entirety.[3] Where a deed is made to A. and B., as tenants in common, it cannot be shown by parol that the conveyance was in reality to a partnership consisting of A. and B,[4] and a grantor cannot show by parol evidence that an embankment, rails, and ties were fixtures and so not included in a deed of land on which such property was, if the property would be considered real estate, in the absence of agreement.[5] The words "use and occupation" in a partnership

clude more property in a sale than that described in the written contract, Osborn v. Hendrickson, *ante;* nor generally can a contract, which the parties intended to make, but did not make, be set up in place of one which they did make, but did not intend to make. Sanford v. Howard, 29 Ala. 684.

Where the conditions of sale described the number and kind of timber trees to be sold by lot, but not the weight of the timber, it was held, in an action for the purchase-money, that oral evidence could not be given by the defendant that the auctioneer had, at the sale, warranted the timber of a certain weight. Rowell v. Edmunds, 12 East, 6; Shelton v. Livius, 2 C. & J. 411. So (Tenny v. Mulvaney, 8 Or. 513), where a contract was entered into to deliver good, sound, merchantable logs, to be cut, from standing timber within a mile from a certain creek, and there was evidence that the logs in question were cut within one-fourth of a mile from the creek, and where the logs were cut and a great many of the trees were rotten, it was held that the question was whether such logs were sound and merchantable, and, therefore, that evidence that they were not as good as other logs on the creek, or whether they were an average lot with other logs on the lot, was not admissible, as the effect of such evidence would be to vary the terms of the contract from a contract to deliver good, sound, merchantable logs to one for the delivery of logs as good as other logs upon the lot, or logs on an average with other logs thereon, which is never admissible. Perrine v. Cheeseman, 11 N. J. L. 174; Huffman v. Hammer, 14 N. J. L. 269; Spencer v. Tilden, 5 Cow. (N. Y.) 144; Lowber v. Le Roy, 2 Sandf. (N. Y.) 202; Donaldson v. Benton, 4 Dev. & B. (N. C.) L. 435; Singleton v. Fore, 7 Mo. 515; Lane v. Price, 5 id. 101; O'Harra v. Hall, 4 Dall. 340; McDowall v. Beckley, 2 Mill (S. C.) Const. 365; Phillips v. Keener, 2 Overt. (Tenn.) 329; Bond v. Jackson, Cooke (Tenn.), 500; Linard v. Patterson, 3 Blackf. (Ind.) 353; Jones v. Webber, 1 N. Chip. (Vt.) 215; Bradley v. Bentley, 8 Vt. 243; Falkoner v. Garrison, 1 McCord (S. C.), 209; Barringer v. Sneed, 3 Stew. (Ala.) 201; Hair v. La Brouse, 10 Ala. 548; Rogers v. Atkinson, 1 Ga. 12; Wynn v. Cox, 5 Ga. 373; Madison, &c., Plank Road Co. v. Stevens, 6 Ind. 379; Irwin v. Ivers, 7 Ind. 308; Warren v. Crew, 22 Iowa, 315; Theurer v. Schmidt, 10 La. Ann. 125; Ferguson v. Glaze, 12 id. 67; Lesseps v. Wicks, id. 739; Young v. Frost, 5 Gill (Md.), 287; Albert v. Ziegler, 29 Pa. St. 50; Evans v. Evans, id. 277; Smith v. McCall, 1 McCord (S. C.), 220; Wade v. Odeneal, 3 Dev. (N. C.) L. 423.

[3] Morrill v. Morrill (Mich., 1904), 101 N. W. 209.

[4] Cundey v. Hall, 208 Penn. 335, 342, 57 A. 761.

[5] Van Husan v. Omaha Bridge & T. R. Co., 118 Iowa, 366, 92 N. W. 47.

agreement plainly imports a leasehold interest, and evidence of the understanding and conduct of the parties cannot be introduced to change it.[6] Parol evidence cannot be used where a contract mentions "legal representatives" in connection with "assigns," to show that a power to bequeath by will was thereby meant, as the term legal representatives has a well-defined meaning.[7] So, evidence is inadmissible to show that the words in a deed "bodily heirs" mean "children" rather than have the ordinary legal meaning of tenants in tail, in the absence of anything in the writing to create an ambiguity.[8] It is the rule of law that the proceeds of a mortgage are to be applied on the mortgage notes in the order of their maturity and therefore parol evidence of an agreement for application of the proceeds in a different order is inadmissible.[9] Parol evidence is inadmissible to show that at the time an option to buy hides was given it was agreed a payment was to be made on the acceptance of the option where the option was silent as to the time of payment, as where nothing appears to the contrary delivery and payment are presumed to be concurrent acts.[10] Where an agreement for sale of goods is silent as to the time of payment, payment on delivery is implied and evidence is inadmissible to show a contemporaneous agreement of the parties to give the buyer sixty days' credit.[11] Where a contract provides, "We [the builder] will pay the freight charges, as agreed upon between you and I," evidence of an oral agreement that the contractor was to pay the charges is inadmissible as contradicting the contract.[12]

Where a deed conveys land described as the west half of a certain quarter except one acre from a certain corner, together with the buildings thereon, parol evidence is admissible to show the boundary of the acre intended, although it differs from a square and the law is in such case that a square would be presumed.[13]

[6] Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

[7] Lullion v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694.

[8] Edins v. Murphree (Ala., 1905), 38 So. 639.

[9] Schultz v. Plankinton Bank, 141 Ill. 116, 30 N. E. 346, 33 Am. St. Rep. 290.

[10] Kibler v. Caplis (Mich., 1905), 103 N. W. 531.

[11] Morton v. Clark, 181 Mass. 134, 63 N. E. R. 409.

[12] Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 Pac. 803.

[13] Lego v. Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706. To the same effect see Mayberry v. Beck (Kan., 1905), 81 Pac. 191.

Thus, where an agreement for the sale of goods was silent as to the time of delivery, in which case the law implies a contract to deliver in a reasonable time, it was held that oral evidence of an agreement to take them away immediately was inadmis-

Sec. 21. Prior and Contemporaneous Independent Agreements. Incomplete Contracts.

But in order to exclude oral proof of a contract, the writing must purport to be a *complete contract.* The rule is that, *in all cases where a writing, although embodying an agreement, is manifestly incomplete and is not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes; but such parts of the actual contract as are not embraced within its scope, may be established by parol.*[1] But it must be remembered that this rule has no force where the contract comes within the Statute of Frauds,[2] as it is contrary to both the letter and spirit of that statute to permit a contract coming within its provision to rest partly in parol.[3] So where a written proposal was not accepted, oral evidence of the terms of the contract is admissible.[4] And it would seem that when a writing is not *ex necessitate legis* (as under the Statute of Frauds), the

sible. Greaves v. Ashlin, 3 Camp. 426; Halliley v. Nicholson, 1 Price, 404. So where a contract of sale, being silent as to time of payment, implies payment on delivery, proof of intended credit is inadmissible. Ford v. Yates, 2 M. & G. 549. Where the defendant, the day after a sale by him of flour to the plaintiff, sent a memorandum of the sale, "Sold White's X. S.," and delivered "White's X. S." accordingly; it was held, that the plaintiff could not show that the contract was for "White's X. X. S." Hamor v. Groves, 15 C. B. 667. It is observable, however, that the four last cases were for non-performance of executory contracts within the Statute of Frauds, which ought to contain *all* the terms of agreement. So where the written agreement was to take goods on board a ship "forthwith," oral evidence to show that they were to be received on board *in two days was* not allowed. Simpson v. Henderson, M. & M. 300. An absolute sale of a reversion can not be qualified by proof of an oral agreement to apportion the accruing rent. Flinn v. Calow, 1 M. & Gr. 589.

[1] Crane v. Elizabeth, &c., Assn., 29 N. J. L. 302; Parker v. Miller, 27 id. 338. The Alida, 1 Abb. Adm. (U. S.) 173; Sheffield v. Page, 1 Sprague, 285; Kieth v. Kerr, 17 Ind. 284; Taylor v. Galland, 3 Iowa, 17; Moss v. Green, 41 Mo. 389; Webster v. Hodgkins, 25 N. H. 128; Sale v. Darragh, 2 Hilt. (N. Y.) 184; Miller v. Fitchorn, 81 Penn. St. 252; Cobb. v. Wallace, 5 Coldw. (Tenn.) 539; Winn v. Chamberlin, 32 Vt. 318. Oral evidence, and a written memorandum not amounting to a contract, may be concurrently admitted to prove the terms of a contract. Mobile Marine Dock, &c., Co. v. McMillan, 31 Ala. 711. Where A. verbally accepts the written proposals of B., the contract is not reduced to writing, and parol evidence is admissible as to its terms. Pacific Works v. Newhall, 34 Conn. 67. So where there was a sale of a certain amount of standing timber by a contract partly reduced to writing, parol evidence was held admissible to show, what did not appear by the writing, *from what tract* the timber was to be cut. Pinney v. Thompson, 3 Iowa, 74.

[2] Choolam v. Kearn, 7 Ves. 211; Parterich v. Pawlet, 2 Atk. 283; Omerad v. Hardman, 5 Ves. 722.

[3] Wood on Statute of Frauds, 736.

[4] Scones v. Dowles, 29 L. J. Ex. 122; see, also, Eden v. Blake, 13 M. & W. 614.

apparent deficiencies of a written agreement as to some particulars of price, time of delivery, etc., may be supplied by oral evidence, although the jury would be directed to presume a reasonable price, or reasonable time, etc., in the absence of such evidence; for such evidence does not *contradict* or *vary* the written document as far as it goes; and it may be that the parties themselves did not intend to commit to paper the *whole* of the contract.[5] Evidence is admissible to establish an oral contract in part execution of which a written contract is given, but not when its purpose is to show that some of the terms of the oral contract were inconsistent with the written one, and ought to be substituted for them,[6] and the oral contract can be proved only with proof of the original written contract.[7]

It is never admissible to show that at the time a written contract was made, an agreement by parol relating to the same subject-matter was also entered into, *but a parol agreement collateral to or independent of such written contract, may be shown.*[8] when it re-

[5] Valpy v. Gibson, 4 C. B. 837.

[6] New Idea Pattern Co. v. Whelan, 75 Conn. 445, 53 A. 953. It may sometimes be competent to show that a written contract was a mere part performance of an entire verbal contract, but that familiar rule does not apply where the verbal contract is inconsistent with the written one or where the writing purports to contain the entire contract. So where a committee representing the owners of certain property made a certain proposition for settlement of claims of creditors, which proposition was accepted by the latter, this is conclusive and no further parol testimony can be admitted to show that the settlement was any different from that expressed in the offer and the reply. Corbett v. Joannes (Wis. 1905), 104 N. W. 69. So a contract to ship "f. o. b. cars" cannot be varied by showing that the consignee agreed to furnish the cars. Vogt v. Shienebeck (Wis., 1904), 100 N. W. 820.

[7] Taft v. Little, 178 N. Y. 127, 591, 70 N. E. R. 211.

[8] Page v. Sheffield, 2 Curt. (U. S.) 377; Phillips v. Preston, 5 How. (U. S.) 278; Shepherd v. Wyrony, 3 W. Va. 46; Heatherley v. Record, 12 Tex. 49; Flanders v. Fay, 40 Vt. 316; Marshall v. Baker, 19 Me. 402; Perry v. Central, &c., R. R. Co., 5 Cald. (Tenn.) 138; Cobb v. O'Neal, 2 Sneed (Tenn.) 238; McKinstry v. Runk, 12 N. J. Eq. 60; Creamer v. Stephenson, 15 Md. 211; Joannes v. Mudge, 6 Allen (Mass.), 245. In Buzzell v. Willard, 44 Vt. 44, it was held that evidence of an oral agreement made collaterally with a deed, and relating to the property conveyed, but entirely independent of the instrument, is admissible. But such a parol agreement is not admissible to show that the grantee agreed to hold the land in trust for the grantor's benefit. Morrall v. Watterson, 7 Kan. 199; State v. Nashville, 2 Tenn. Ch. 755. Nor that it was verbally agreed that the manure on the lands should pass with the deed. Proctor v. Gibson, 49 N. H. 62. Nor to add a covenant to the deed. Sawyer v. Vories, 44 Ga. 662. Nor to attach a condition to the deed repugnant to its legal effect. Beers v. Beers, 22 Mich. 42. Or that a deed perfect on its face was delivered upon condition. Miller v. Fletcher, 27 Gratt. (Va.) 403.

lates to a matter about which the writing is silent,[9] or to show a new and independent contract relating to the same subject-matter *subsequently entered into by parol upon a good consideration,* whether it is a substitute for the old contract, or is in addition to it,[10] and in such case, if the new contract covers the whole subject-matter of the written one, it supersedes and extinguishes it, and it is merged in the parol contract.[11] But if the new contract only relates to a part of the matters embraced in the written one, it only supersedes the latter as to the matters to which it relates, leaving the written contract in force as to all other matters.[12] So, where a writing, although embodying an agreement, is manifestly incomplete, and not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes; but such parts of the actual contract as are not embraced within its scope, may be established by parol evidence.[13]

But this must be understood as applying only *when the writing was evidently not intended as the complete contract.* If the parties intended that the writing should embrace the entire contract, parol evidence is not admissible at law to add terms thereto, even though they were omitted by mistake.[14] In the latter case the writing itself is the sole exponent of the contract and cannot be varied by parol.[15] It is not enough for the admission of extrinsic evidence that the writing fails to express the whole contract which the parties made. On the contrary, it must be apparent they did not intend so to do, and where elaborate contracts are signed extrinsic evidence will not ordinarily be admitted.[16] The rule stated may be said to apply only to informal instruments and loose memoranda which were manifestly not intended by the

[9] Keough v. McNitt, 6 Minn. 513; Ruggles v. Swarrick, 6 id. 457.

[10] Heatherly v. Record, 12 Tex. 49; Cummings v. Putnam, 19 N. H. 969; Van Buskirk v. Roberts, 31 N. Y. 661.

[11] Bernard v. Sampson, 12 N. Y. 561.

[12] Mowatt v. Lord Londersborough, 3 E. & B. 307; McCullough v. Girard, 4 Wash. (U. S. C. C.) 289; Atwood v. Norton, 27 Barb. (N. Y.) 638.

[13] McCullough v Girard, 4 Wash. (U. S. C. C.) 292; Hunt v. Adams, 6 Mass. 519; The Alida, 1 Abb. Adm. (U. S.) 173; Sheffield v. Page, 1 Sprague (U. S. C. C.), 285; Keith v. Kerr, 17 Ind. 284; Taylor v. Galland, 3 Greene (Iowa), 17; Moss v. Green, 41 Mo. 389; Webster v. Hodgkins, 25 N. H. 128; Sale v. Darragh, 2 Hilt, (N. Y.) 184; Miller v. Fichthorn, 31 Pa. St. 252; Cobb v. Wallace, 5 Coldw. (Tenn.) 539; Winn v. Chamberlain, 32 Vt. 318.

[14] Young v. Jacoway, 17 Miss. 212; Crane v. Elizabeth, &c., Assn., 29 N. J. L. 302.

[15] Perkins v. Young, 1 Gray (Mass.), 389; Kirk v. Hartman, 63 Penn. St. 97; Cooke v. Bailey, 42 Miss. 81.

[16] John O'Brien Lumber Co. v. Wilkinson, 117 Wis. 468, 94 N. W. 337.

parties to contain the terms of their contract.[16a] For example, where a contract for repair of a house is loosely and artificially drawn and mentions only in general terms the work to be done and the materials to be used and the time of completion, these details are capable of parol proof.[17] Where a contract for the sale of lumber was made by an exchange of letters setting forth the agreements of the parties in short form, it was held admissible to show a contemporaneous parol agreement that the lumber should be scaled by a scaler selected by one of the parties and that his scale should control. The court lays down the following rule: "Where the writing or writings, by reason of their brevity, informality, or skeleton nature, do not of themselves import that all the stipulations between the parties with reference to the subject-matter were intended to be expressed in them—and where the particular stipulation is of such nature that the omission to express it in the writing does not indicate that it was not agreed upon—and it in no way conflicts with any written stipulation—and does not increase the burdens of either party—parol evidence of such stipulation is admissible. We do not say that all the above conditions must exist before the parol evidence can be received. We only say that where they do exist, the parol evidence is admissible."[18] But where a contract consisted of a proposal to furnish scrap iron and was in short form, still evidence was held inadmissible to show that the

[16a] Thus, where a plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and shortly after the purchase was completed, the defendant gave him a paper in the following form:—"Bought of A. B., a horse for 7*l*.—A. B."—the court, in an action for breach of warranty, held that the plaintiff might prove the warranty by parol evidence, as the paper appeared to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, and not as containing the terms of the contract itself. Allen v. Pink, 4 M. & W. 140. So, where a person, after having agreed to hire a horse, had given the owner a card, on which he had written in pencil, "six weeks at two guineas, W. H.," the owner was allowed to prove by parol evidence, not indeed a different time of hiring or a larger rate of payment than those stated in the memorandum, *but an additional term of the contract*, namely, that all accidents occasioned by the *shying* of the horse should be at the risk of the hirer. Jeffrey v. Walton, 1 Stark. 267; Hadley v. Clinton, &c., Co., 13 Ohio St. 502. Again, in the sale of a chattel under the value of 10*l*., an auctioneer is not bound by the description of the article contained in the unsigned printed catalogue; but if, when the article was put up at auction, he publicly stated in the hearing of the purchaser that the description was incorrect, he will be entitled to a verdict for the price on giving parol proof of such statement. Eden v. Blake, 13 M. & W. 614.

[17] Whately v. Reese, 128 Ala. 500, 29 So. 606.

[18] Gould v. Boston Excelsior Co., 91 Maine 214, 39 A. 554, 64 Am. St. Rep. 221.

real contract between the parties was verbal and that the written contract was struck off in a hurry to fix the price.[19] Where an agreement contained in a letter refers to a prior conversation as embodying the understanding of the parties, the conversation may be proved as incorporated by reference.[20] In an action on a lien note parol evidence is admissible to show a contemporaneous agreement that the defendant might return horses bought and cancel his note if they were unsatisfactory on trial.[21] But as previously stated, this rule, or rather exception to the general rule, is confined wholly to that class of writings which are mere memoranda, and were manifestly not intended to express the entire contract between the parties.

In other words, *the writing on its face should rebut the presumption that it is complete,*[22] although it is not necessary that it should expressly and directly do so. Thus, where all the terms of a contract for the sale of a crop of cotton were reduced to writing, *except as to the time of delivery,* it was held competent to show, by parol, that at the time the contract was entered into, a day was fixed for delivery.[23] But where a contract for the sale of calves provided for delivery on certain specified dates, parol evidence is inadmissible to show that it was agreed that the seller should not be held to exact dates as to the delivery of the calves.[24] So, where a contract for the delivery of articles was silent as to the *place* of delivery, it was held that parol evidence was admissible to show that at the time the contract was executed, a particular place for delivery was agreed upon.[25] It will, from the last two instances given, be seen that, contrary to the doctrine of some of the early cases,[26] the presumption which the law raises, either as to the time or place when or where a written contract is to be performed, may be overcome by parol proof of a contemporaneous agreement in that respect; but where a contract expressly provides that it shall be performed "within a reasonable time," parol evidence that a particular time was agreed upon within which it

[19] Helper v. MacKinnon Mfg. Co. (Mich., 1904), 101 N. W. 804.

[20] Gould v. Magnolia Metal Co., 207 Ill. 172; 69 N. E. R. 896.

[21] Gilman Bros. v. Williams, 74 Vt. 327; 52 A. 428.

[22] Jeffrey v. Walton, *ante.*

[23] Johnston v. McRary, 5 Jones (N. C.) L. 369.

[24] Nebraska Land & Feeding Co. v. Trauernan (Neb., 1904), 98 N. W. 37 (containing list of matters which may be shown by parol).

[25] Mussleman v. Stoner, 31 Penn. St. 268.

[26] Barringer v. Sneed, 1 Stew. (Ala.) 201; Ely v. Adams, 19 John. (N. Y.) 312.

should be performed is not admissible. In such a case the jury must determine what is a reasonable time, and the contract is complete.[27]

[27] Jenkins v. Lykes, 19 Fla. 148.

In the case of a blank indorsement of a bill or note, upon the principle already stated, the immediate parties to the instrument are not precluded from giving evidence of parol contemporaneous stipulations showing that a restricted operation was intended to be given to the signature, or that the transfer was upon trust, and not absolute (Stackpole v. Arnold, 11 Mass. 32; Susquehanna Bridge v. Evans, 4 Wash. (U. S. C. C.) 480; Bank of United States v. Dunn, 6 Pet. (U. S.) 51; Brock v. Thompson, 1 Bailey (S. C.), 322; Barry v. Morse, 3 N. H. 132; Fuller v. McDonald, 8 Me. 213; Wright v. Latham, 3 Murph. (N. C.) 208; Barrows v. Lane, 5 Vt. 161; Pike v. Street, 1 M. & M. 226; Hill v. Ely, 5 S. & R. (Penn.), 363; Dean v. Hall, 17 Wend. (N. Y.) 214; Perkins v. Catlin, 11 Conn. 213; Smith v. Barber, 1 Root (Conn.), 207; Barker v. Prentiss, 6 Mass. 430; Butler v. Suddeth, 6 Mon. (Ky.) 541; Daniel v. MacRae, 2 Hawks (N. C.), 590; Granby v. Harden, 7 Taunt. 163; Brent v. Metropolis Bank, 1 Pet. (U. S.) 89; Landsale v. Brown, 3 Wash. (U. S. C. C. 404); for in such cases the contract is left incomplete by the parties. So, where a contract is silent as to the quantity of certain articles to be delivered, parol evidence is admissible to show it. Thus, where a receipt was given for money in this form: "Rec'd of H. S. Potter, five hundred dollars, as advance on my wheat, to be delivered before the 1st of July, at the Rochester price," it was held that parol evidence was admissible to show that the agreement was to deliver 600 or 700 bushels of wheat before the 1st of July at the plaintiff's warehouse, and was to have the Rochester market price at any time before that day, which he might elect. Potter v. Hopkins, 25 Wend. (N. Y.) 417; Norton v. Woodruff, 2 N. Y. 153; Young v. Bushnell, 8 Bos. (N. Y.) 1; Lent v. Hodgman, 15 Barb. (N. Y.) 274.

So in various cases of a somewhat similar nature, where a writing has been executed by way of part performance merely of a parol contract. A familiar illustration is where a chattel has been sold with warranty not in writing, and a note given for the purchase-money. Clearly the note, in such instances, would not merge the parol contract. Shepherd v. Temple, 3 N. H. 455; Reab v. McAllister, 8 Wend. (N. Y.) 116; McCulloch v. Girard, 4 Wash. (U. S. C. C.) 289. So a parol agreement between the parties was entered into, relating to the transfer of certain shares of stock in a bank not then completely organized. At the conclusion of the agreement, the defendant signed a paper, promising, in a general way, to transfer the shares as soon as books for that purpose should be opened by the bank. The defendant contended that this instrument should be treated as evincing the entire agreement, and that no parol evidence could be received of stipulations not contained in it. The court, however, deemed it a question of fact for the jury whether the instrument was given in full execution of the parol contract or in part merely; and WASHINGTON, J., who delivered the opinion, said—"if it should turn out that it formed a part of the agreement that such a paper should be given, or that a paper of that description was, in the ordinary course of the defendant's business, in respect to transactions of this nature, given by him, evidence of the parol contract will be proper, and will not violate any of the rules of evidence." McCullough v. Girard, *ante*. In an action brought to recover a sum of money, for which the defendants had signed a writing whereby they acknowledged its receipt of the plaintiff "by the hands of B. to be accounted for," parol evidence on the part of the defendants to show that before the writing was signed, the plaintiff being indebted to L., and L. to the defendants, it was agreed that this

A plain and well-established exception to the general doctrine which regards all anterior and contemporaneous stipulations and representations as merged in the written contract, exists, where one party sues the other, alleging as the gravamen of the action, some *fraud* of the latter, by which the former was induced to enter into

money should be paid to the defendants in part payment of their claim against L., and in part satisfaction of L.'s claim against the plaintiff, was held admissible. The court said the instrument was not a mere receipt, and therefore liable as such to be varied; nor was it one of those writings which are to be regarded as merging all previous negotiations; they viewed it as given merely in part execution of the parol contract, and therefore the latter might be proved. Gerrish v. Washburn, 9 Pick. (Mass.) 338. In another case, M. filed his bill in chancery, claiming a lien on lands sold to him by J. for an unpaid balance of the purchase-money. The bill charged that at the time of the purchase the number of acres in the tract sold was not ascertained; but it was agreed to estimate the quantity of 300 acres, with the understanding that a survey should subsequently be made, and if the tract should turn out to contain more land, the excess should be paid for at the same rate per acre as the three hundred acres, the supposed number; that with this understanding a bond of conveyance was executed by M. on the 17th of May, 1826, and a bond for the purchase-money, according to the estimate above mentioned, by J. on the day following; that a survey of the land was afterwards made, and it was found to contain a surplus of 230 acres over the estimated quantity; and for the price of the latter the complainant proceeded, he having previously assigned the bond for the other part of the purchase-money to one B. This bond was not produced, and the court declined deciding as to the existence of the lien until the contents of the bond should be proved in some way. But they said that, unless there was something in the structure of the bond which negatives the lien, it would have to be enforced. In respect to the parol proof relied on, they added—"On the supposition that the bond is a mere obligation for the payment of money, without reciting the contract of sale, there could be no possible legal objection to the admissibility of the evidence in relation to the excess of land above three hundred acres. It is in this light we have supposed it to exist. In that view, the introduction of the parol evidence would not affect in any manner the contract, as evinced by the bond of conveyance and bond for the purchase-money, but being evidence of a substantive independent contract, its admissibility could not be met by any legal objection." Hall v. Maccubin, 6 G. & J. (Md.) 107.

On the same principle, where there is a writing importing a sale of personal property, or any other instrument of transfer, it will preclude the vendee from proving an agreement between him and the vendor, contemporaneous with the instrument, and consisting with its terms, that the value of the property should be applied to the payment of the defendant's debts. McCreary v. McCreary, 5 G. & J. (Md.) 147. The last case, like the one preceding it, goes on the proposition that parol evidence is admissible, in cases of written instruments, to prove collateral and independent facts, about which the writing is silent. In a case in Indiana, Kelsey and Dickson being partners in a mill which they had built, entered into a written agreement stating *inter alia* that Dickson had bought Kelsey's interest in the mill for 500 dollars, to be paid in certain installments. Kelsey, in an action against Dickson for the purchase-money, was permitted to show, by parol evidence, that the sum of 500 dollars which Dickson was to pay Kelsey for his interest in the mill was exclusive of the expense that had been incurred in building it, and

the contract. It has been laid down in broad terms, that the rule which prefers written to unwritten evidence, does not so apply as to exclude the latter, when its object is to prove that the former had been fraudulently obtained, and thereby to avoid the contract evidenced by it, or secure indemnity to the party injured.[28]

that those expenses were to be paid by Dickson. Kelsey v. Dickson, 2 Blackf. (Ind.) 236; 3 id. 189.

[28] Cozzens v. Whitaker, 3 S. & P. (Ala.) 329; see Becker v. Vrooman, 13 John. (N. Y.) 301; Johnson v. Miln, 14 Wend. (N. Y.) 195; *per* MARSHALL, C. J., in Tayloe v. Riggs, 1 Pet. (U. S.) 591; *per* KENT, C. J., in Mumford v. M'Pherson, 1 John. (N. Y.) 44.

In an action on the case for deceit in the sale of a slave, though there was a written bill of sale, containing a warranty of soundness in "body, mind and title," yet it was held that parol evidence going to prove other representations made by the vendor at the time, such as that the slave was industrious and free from vice, whereas he knew the contrary to be the fact was admissible. Cozzens v. Whitaker, 3 S. & P. (Ala.) 322; S. P. M'Farlane v. Moore, 1 Tenn. 174; see Johnson v. Brockelbank, 2 Hill (N. Y.) 353; Smith v. Williams, Murph. (N. C.) 426; Wren v. Wardlaw, 1 Ala. 363; Mumford v. M'Pherson, 1 John (N. Y.) 418; Fleming v. Slocum, 18 John. (N. Y.) 403. So, where the bill of sale of a slave contained a warranty of soundness, but expressly excepted the "phthisic;" it was held that the vendee might nevertheless prove, in an action for deceit, that the vendor represented the slave as having the phthisic only slightly, whereas he knew her to be in the last stage of that disease. Hanks v. M'Kee, 2 Litt. (Ky.) 227. But in Louisiana, in an action on a note given for the price of a slave, the defendant set up that the slave was in the habit of running away, and that the plaintiff knew this to be the case when he sold him. The bill of sale was under seal, and expressly stated the slave to be a "runaway and a drunkard." The defendant introduced evidence to show that the plaintiff falsely represented this as a qualified vice. The court, however, held him concluded by the deed. Bayton v. Towles, 5 Mart. (La.) 1. Warranty is a contract, and being established by sufficient proof, it is not admissible to show that the representations were made in good faith. Brisbane v. Parsons, 33 N. Y. 332. A bill of sale in this form: *Mr. W. M., bought of B. S. and B.*, specifying the articles and their prices and the aggregate amount, delivered with the goods, constitutes a valid sale, which cannot be contradicted by parol evidence offered to show that the transaction was not a sale, but only a bailment. Bonesteel v. Flack, 41 Barb. (N. Y.) 435. When such a bill is delivered on the sale of a horse, adding to it the words "received payment," signed by the seller, it is adjudged a receipt, and not a contract or bill of sale which will exclude parol evidence of a warranty of the soundness of the horse. Filkins v. Whyland, 24 N. Y. 338, nor as containing the terms of the contract itself. Allen v. Pink, 4 M. & W. 140; Dunn v. Hewitt, 2 Den. (N. Y.) 637; Blood v. Harrington, 8 Pick. (Mass.) 552. In Hawson v. Henderson, 21 N. H. 224, parol evidence of the warranty was received, through there was a formal bill of sale. The instrument, signed and delivered by the seller as a memorandum of the sale, is evidence of a contract (Long v. Wheeler, 25 N. Y. 520)—an incomplete contract, (Koop v. Handy, 41 Barb. [N. Y.] 454.)—not excluding proof of warranty by parol evidence. Parol evidence should not be received to vary the terms of a written agreement, and though received erroneously it is still the duty of the court and jury to give effect to the written in opposition to the verbal contract. (Durgin v. Ireland and Pruden, 14 N. Y. 322.) Where a person was induced to purchase land, by a fraudulent representation that a certain privilege was connected

But where the writing is complete, all prior negotiations are merged therein.[28a] Thus, parol evidence is inadmissible to vary

with the land, which the vendor knew was not included in the deed; it was held that the vendee might recover. Monell v. Colden, 13 John. (N. Y.) 395; see also Russell v. Rogers, 15 Wend. (N. Y.) 351; Johnson v. Miln, 14 id. 199. And in Louisiana, fraud in the sale, in such case, was allowed to be proved by way of defense to an action for the purchase-money. Broussard v. Sudrigue, 4 Mill (La.) 347. So in South Carolina; and even representations founded simply in mistake, are there admissible as a defense, either to the whole action or *pro tanto*, as the case may be. Means v. Brickell, 2 Hill (S. C.) 657.

[28a] Thus in a Connecticut case, Fitch v. Woodruff Iron Works, 29 Conn. 82, the defendants made a written contract with the plaintiff to make and set for him "one drop flue boiler, 6½ feet in diameter, and 24 feet long, with all the iron work belonging to it—all the work to be done in the best manner and of the best material, and satisfactory." In a suit on the contract, in which the plaintiff claimed that the boiler was not properly made or set, he offered to show that, during the negotiations which resulted in the making of the contract, he informed the defendants how much machinery the old boilers then in his mill would operate, and that he wanted a new boiler of the same efficiency, and that the defendants assured him that the boiler which they would make should be as efficient as the old ones, and consume at least one-third less fuel, and that, on the faith of this assurance, he entered into the agreement; with further evidence that the boiler consumed more fuel and was less efficient than the old ones. It was held that the negotiations were merged in the written agreement, and that the evidence was inadmissible.

So where the owner of land entered into a contract under seal with a railroad company to convey to the company a right of way over his land, in consideration of $1, and of their building their road, etc., it was held that evidence was not admissible in an action to enforce the contract to prove a verbal agreement on the part of the company to fill up a sluice upon the land, as part consideration of the conveyance. Purinton v. Northern Ill. R. R. Co., 46 Ill. 297. In a New Hampshire case, Pillsbury v. Locke, 33 N. H. 96, the defendant contracted in writing to take all the white oak timber upon the plaintiff's land that was "suitable for ship timber." It was held that evidence of declarations made at the time when the contract was entered into, that the vessel for which he designed the timber, was a small-sized one, and that he wanted the *small* timber upon the lot to put into the top of the vessel, for the purpose of showing what sized timber he wanted, was inadmissible. In another New Hampshire case, Hadydon v. Waldron, 9 N. H. 66, A. entered into a written agreement with B. to haul all the logs upon a certain lot to another place, before a certain period. In an action upon such agreement it was held that A. could not introduce evidence to show that B. said, at the time of making the contract, that, if there should not be snow enough, he must leave them on the ground. In a New York case, Mallon v. Story, 2 E. D. S. (N. Y. C. P.) 331, the plaintiff, by a written agreement, bound himself to labor on a railroad at five shillings a day, and at the same time, by parol, was promised twelve shillings per day if employed on rock work. It was held that the written agreement being general in its terms could not be controlled by evidence of the parol promise, and in the absence of any deceit as to the contents of the written agreement, the plaintiff though an ignorant man, could recover on that only. So, where there was a written agreement to deliver "25,000 pale brick for three dollars per M, and 50,000 hard brick for four dollars per M cash," parol evidence was held inadmissible to show that the parties intended the delivery to be in parcels, payment for each parcel to

what appears to be a complete contract of adoption by evidence that the adopting party agreed with the mother of the child to leave it all his property on his death.[29] Where by contract the

be due as it was delivered. Baker v. Higgins, 21 N. Y. 397. So, where a written contract made the inspection and determination of one S. as to the quality or grade of certain hops, conclusive upon the parties, evidence offered to show that they were of inferior quality and worthless, was held inadmissible. Clinton v. Brown, 41 Barb. (N. Y.) 226. So, where there was writing, either in the body of a written agreement or in the form of a party's signature, indicating that the obligation thereby created was intended to be any other than a personal obligation on his part, it was held that parol evidence was inadmissible to show that the agreement was in fact the obligation of third persons, and that such party signed the agreement as their agent. Babbet v. Young, 51 Barb. (N. Y.) 466. Where there was a written agreement to ship hogs to New York, evidence of a verbal agreement that they should be shipped by a certain one of two usual routes was rejected. Webster v. Paul, 10 O. St. 531. A contract for masonry was perfectly clear in its specifications as to quality, etc. The work never having been accepted, the contractor suing for damages, attempted to show by parol that the understanding and agreement of the parties was that the work should be done, not according to the specifications, but like other work previously done by the same contractor for other parties; that the specification in the contract was a printed form made for all contracts entered into by the commissioners of works, and not prepared with reference to this particular contract. The evidence was excluded. Walker v. Manning, 6 Iowa, 519. In an action by a contractor for carrying the mails against a sub-contractor for default in performing the sub-contract, parol evidence was held to be inadmissible to show that the plaintiff agreed to obtain the consent of the post-office department to a transfer of the contract to the defendant. Pierce v. Walker, 23 Iowa, 424. Where the plaintiff, in an action on a contract for constructing a canal, offered to prove that the defendants, either at the time when the contract was executed, or in the preliminary negotiations concerning it, verbally promised him to construct a slope wall against the embankment as the work advanced, which would have prevented it from being swept away by the floods, it was held that such evidence was inadmissible to control or vary the contract in writing, in not coming within the rule allowing the introduction of evidence as to the actual state of things at the time when a contract in writing is made, to aid in its construction. Boyle v. Agawam Canal Co., 22 Pick. (Mass.) 381. It is hardly necessary to say that parol evidence is never admissible to show a contemporaneous agreement inconsistent with that which is written; as, that when a contract for the payment of money was executed, it was agreed that property instead of money should be accepted; Roundtree v. Gilroy 57 Tex. 176; Van Vechten v. Smith, 59 Iowa, 173. Nor in an action on a note can it be shown that a mistake was made in arriving at the amount for which it was given. Clute v. Frasier, 58 Iowa, 268; or that when a contract was entered into by A., to pay B.'s debts, it was agreed by parol that a debt due from B. to C. was not included, Brenner v. Luth, 28 Kan. 581; or, that under a contract by A. to ship to B. a certain quantity of goods, it was agreed that he should only ship what he then had on hand, Schreiber v. Butler, 84 Ind. 576, because in all these instances the effect of the evidence is to vary the written contract. The illustrations given will furnish a fair test by which to determine when parol evidence is or is not admissible to set up an independent parol agreement.

[29] Brantingham v. Huff, 174 N. Y. 53, 524, 66 N. E. R. 620.

defendant was to furnish logs and the plaintiff to saw them, an oral agreement to build a log slide for delivery to the plaintiff's mill was held inadmissible, as the written contract appeared complete.[30] Where an order for goods contained a statement that "all understandings, conditions and agreements between the buyer and the salesman must be stated in the order," it is not open to the buyer who gave the order to show that it was given on the understanding that he was to be the sole distributive agent of the seller in a certain territory.[31] Where a contract of agency provides that an agent shall have the right to sell goods in a certain district a parol agreement that this right is exclusive is inadmissible in evidence.[32] Where the final letter appointing plaintiffs as agents spoke of establishing a "permanent insurance business," but made no definite statement of the duration of the agency, it was held that the contract was complete in itself and could not be supplemented by parol evidence of the duration of the agency.[33] But a provision in a contract for payment "as provided hereafter" is ambiguous and may be explained by parol evidence that prior to the execution of the contract an agreement as to payment had been made.[34] Where a party signed a contract to allow a telephone company to put its wires across his land parol evidence is inadmissible of a contemporaneous agreement that the company was to put its wires only over a certain portion of his land.[35] A contract of insurance cannot be varied by evidence of a contemporaneous parol agreement with the agent.[36] A written contract to inscribe a word on a tablet cannot be varied by evidence of a contemporaneous parol agreement to write it in raised letters.[37] Evidence of the understanding of the parties is not admissible to explain the meaning of the words, "to be advertised until sold," as this would be a contradiction of the writing.

[30] Mead v. Dunlevie, 174 N. Y. 108, 66 N. Y. 658.

[31] Patten-Worsham Drug Co. v. Planters Mercantile Co. (Miss., 1905), 38 So. 209.

[32] Roberts v. Minneapolis Threshing Machine Co., 8 S. D. 579, 67 N. W. 607, 59 Am. St. Rep. 777.

[33] Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. R. 359.

[34] Morrison v. Dickey (Ga., 1905), 50 S. E. 178.

[35] Southern Bell Tel. & Tel. Co. v. Harris, 117 Ga. 1001, 44 S. E. 885.

[36] Arguimbau v. Germania Fire Ins. Co., 106 La. 139, 30 So. 148.

[37] Nelson & Daniels v. Godfrey, 74 Vt. 470, 52 A. 1037.

[38] Wikle v. Johnson Laboratories, 132 Ala. 268, 31 So. 715.

Sec. 22. Receipts, Releases and Tickets.

An exception is also allowed, where the writing is one of that character which the law does not regard as the best evidence of the transaction to which it relates. Such are general receipts, and other instruments of the like nature,[1] though when these assume the form of a contract, they are to be treated so far as the exclusive medium of proving what the parties agreed to. A release for a valid consideration of all claims on account of injuries suffered at a certain time is not a mere receipt but is a contract and cannot be varied by extrinsic evidence, as of an agreement to furnish the plaintiff medical service until he should recover from his injury,[2] or of an additional agreement of employment.[3] Bills of parcels fall within the range of the exception.[4]

The inconclusiveness of receipts, as such, has been recognized and acted upon in numerous cases.[5] A receipt is not a contract,

[1] Baugh v. Brassfield, 5 J. J. Mar. (Ky.) 97; Hitt v. Slocum, 37 Vt. 524; Nye v. Kellum, 18 id. 594; Street v. Hall, 29 id. 165; Jones v. Patterson, 1 W. & S. (Penn.) 321; Badger v. Jones, 12 Ark. 371; Oakley v. State, 40 Ala. 392; Calhoun v. Richardson, 30 Conn. 216; Hawley v. Badger, 15 Cal. 44; Porter v. Chicago, &c., R. R. Co., 20 Iowa, 73; Dunnagan v. Dunnagan, 38 Ga. 554; Illinois, &c., R. R. Co. v. Cowles, 32 Ill. 116; Baugh v. Brassfield, 5 J. J. Mar. (Ky.) 79; Carr v. Minor, 42 Ill. 179; Bringler v. Gordon, 14 La. An. 274; Richardson v. Reed, 43 Me. 161; Dunham v. Bauer, 9 Allen (Mass.), 352; Rowe v. Wright, 12 Mich. 289; Ben v. Wiley, 17 Mich. 508; Williams v. State, 20 Miss. 58; Wallace v. Wilson, 30 Mo. 335; Edgerley v. Emerson, 23 N. H. 555; Furbush v. Goodwin, 25 id. 425; Bird v. Davis, 14 N. J. Eq. 467; Wadsworth v. Alcott, 6 N. Y. 64; Buswell v. Ponier, 37 id. 312; Dutton v. Tilden, 13 Penn. St. 46. And this is held to be the rule in some of the States where the receipt is under seal. Jones v. Ward, 10 Yerg. (Tenn.) 160. But in those States where the distinction between simple contracts and specialties is preserved, the rule would be otherwise. State v. Mesick, 1 Houst. (Del.) 346.

[2] Lanham v. Louisville & Nashville R. Co. (Ky., 1905), 86 S. W. 680.

[3] Atchison, T. & S. F. R. Co. v. Vanordstrand, 67 Kan. 386, 73 P. 113; Rapid Transit Ry. Co. v. Smith (Tex., 1905), 86 S. W. 322. See, also, Smith v. Brown, 3 Hawks (N. C.), 580; Raymond v. Roberts, 2 Aik. (Vt.) 204; Stone v. Vance, 6 Hamm. (Ohio) 246; but, see, Potter v. Hopkins, 25 Wend. (N. Y.) 417.

[4] Harris v. Johnson, 3 Cranch (U. S.), 311. So where it appeared that A. sold B. a quantity of hops, and gave a bill of parcels, stating the number of bags, weight, price, etc., with a clause added as follows: "These hops are warranted to be of the best quality," in an action against A. for a breach of the warranty it was held that A. was not precluded by the bill of parcels from proving that the hops were warranted only in case they were carried to a particular place. Wallace v. Brown, 2 N. H. 596.

[5] Goddard v. Cutts, 11 Me. 440; Chunn v. M'Carson, 2 Dev. Eq. (N. C.) 73, 74; Beers v. Broome, 4 Conn. 467; Lingan v. Henderson, 1 Bland's Ch. (Md.) 249; Graves v. Key, 3 B. & Ad. 318; Fairmaner v. Budd, 7 Bing. 574. In Fuller v. Crittenden, 9 Conn. 401, several of the cases on this subject were reviewed and the re-

but a mere admission or declaration in writing, and as such may be controverted or explained by parol evidence. So, a receipt for $1,250, "being full payment of his contract," may be shown to be signed subject to the oral agreement that, if the plaintiff should be able to prove that he was entitled to payment in Japanese yens rather than in American dollars the receipt was to be void.[6] But if a receipt in full is given with the knowledge of all the circumstances, and there is no mistake or surprise on one side, or fraud or imposition on the other, it will be effectual to defeat a further claim.[7] A receipt of a certain sum in full of all demands, though not conclusive, is *prima facie* evidence of a settlement between the parties, and a payment of the balance, and it is erroneous to say that it is only evidence of the payment of the sum specified.[8] The circumstances attending the execution of a receipt in full of all demands may be given in evidence to show that by mistake it was made to express more than intended, and that the creditor had in fact claims that were not included.[9] So a receipt in full may be explained or contradicted by parol evidence that it was, as between the parties, to have no effect and that the debtor promised to pay in full outside of the receipt.[10]

A receipt, although evidence of the highest character of the payment of money as stated in it, is merely *prima facie* evidence and may be explained or contradicted by parol.[11] Parol evidence is competent to explain how a receipt came to be given, and what it

sult declared to be, that such circumstances as would lead a court of equity to set aside a contract (*e. g.* fraud, mistake, or surprise) may be shown at law, to destroy the effect of a receipt.

[6] Komp v. Raymond, 175 N. Y. 102, 67 N. E. R. 113.

[7] Emrie v. Gilbert, 1 Wright (Ohio), 764; Holbrooke v. Blodget, 5 Vt. 520; Sessions v. Gilbert, Brayt. (Vt.) 75; Carter v. Bellamy, Kirby (Conn.), 291; Giddings v. Munson, 4 Vt. 308.

[8] Reid v. Reid, 2 Dev. (N. C.) 247.

[9] Fire Insurance Assn. v. Wickham, 141 U. S. 564, 581, 12 S. Ct. 84, *contra*, Pierson v. Hooker, 3 John. (N. Y.) 68. In Klopot v. Metropolitan Stock Exchange, 188 Mass. 335, it appeared that the plaintiff had signed, in a fictitious name in which he had been doing business, a release under seal of claims order wagering contract transactions, including "any payment at any time heretofore made . . . either on written or any other transaction whatever" and it was held that this release barred a claim on a prior transaction under his real name, although the prior transaction was not in the minds of the parties, and the defendant was not even aware of his identity.

[10] Chapel v. Clark, 117 Mich. 63, 76 N. W. 62, 72 Am. St. Rep. 587.

[11] Devencenzi v. Cassinelli (Nev., 1905), 81 Pac. 41, where the court refused to upset a verdict for the plaintiff who testified that he never got any money at the time he signed a certain receipt for $500, and that he signed the receipt simply for the accommodation of the defendant.

was intended for,[12] or to show that a receipt was given without consideration and as a duplicate.[13] Receipts for rent running to a former lessee may be explained by showing that they were in fact to the later occupier of leased premises.[14] On the same principle, evidence was held admissible to show that a certain receipt, " to balance boiler account in full " was not to be deemed an acceptance of the boiler.[15] A receipt for money is not exclusive that the debtor directed the payment to be applied to the account named in the receipt.[16]

[12] Hennessy v. Kennedy Furniture Co., 30 Mont. 264, 76 Pac. 291.

[13] Truworthy v. French, 97 Maine, 143, 53 A. 1005.

[14] Starkweather v. Maginnis, 196 Ill. 274, 63 N. E. R. 692.

[15] Seeger v. Manitowoc Steam Boiler Works, 120 Wis. 11, 97 N. W. 485.

[16] Lyon v. Bean (Ala., 1904), 37 So. 515.

A receipt " in full of rent for factory up to " a particular ay is *prima facie* evidence not merely that the last quarter's rent ending on the day specified was paid, but that all previous rent was paid. Patterson v. Ackerson, Edw. Ch. (N. Y.) 427. Where a receipt was indorsed by the agent of the plaintiff in execution for a certain sum " in full of the within execution," it was held that evidence might be admitted to show an error, and that the receipt was only to be in full of all the money then made on the execution. Singleton v. Smith, 4 Mill. (La.) 430. The receipt may be explained by parol evidence of usage. Goodyear v. Ogden, 4 Hill (N. Y.), 104; Dawson v. Kittle, id. 107.

A receipt of property levied on by a sheriff, containing the usual promise to redeliver for the purpose of satisfying the execution, was held within the general principle applicable to contracts, and not liable to be varied by parol evidence (Curtis v. Wakefield, 15 Pick. [Mass.] 437; Brusley v. Hamilton, 15 id. 40); and an agreement of the officer and the ereditor, contemporaneous with the receipt, that they would relieve the receiptor by taking back the property, is merged in the writing. Curtis v. Wakefield, 15 Pick. (Mass.) 437. But a recital or statement of the value of the property in such or the like receipts will not generally conclude the party giving them, even as in favor of the other party; otherwise, however, where the party giving the receipt has wilfully refused to return the property, or has destroyed it, etc. Bancroft v. Parker, 13 Pick. (Mass.) 192. Where a receipt was collateral to the instrument declared on, and used by a stranger against a party, it was held that the latter might contradict or vary it by parol. Badger v. Jones, 12 Pick. (Mass.) 371.

Indeed, in regard to mere written admission of various kinds, they are seldom, if ever, conclusive against the party making them save as in favor of some one who has been drawn in to act upon the assumption of their being what they import on their face. But, even as in favor if those who have been drawn in to act, such admissions will not conclude, except for their own proper object, and while the writing evincing them continues in force. Hence, though a receiptor of property levied on by an officer will generally be precluded from showing title in himself, as against the officer, yet, where A. gave such a receipt, in which he admitted the property to belong to S., the defendant in the execution, and the property was afterwards redelivered to the sheriff pursuant to the terms of the writing, it was held that the receiptor was not estopped by anything in the writing, or his acts, from bringing replevin on the ground of the property being his. The writing would be a strong

Parol evidence is admissible to show that an illiterate person signed a release without knowledge of its contents or intending to sign such an instrument.[17] In a proceeding in equity, it is open to a party to show that a certain receipt he signed was signed by mistake induced by the fraud of the other party.[18]

A railroad ticket is more in the nature of a receipt than a contract, and parol evidence is competent to show additional conditions not expressed on the face of the ticket.[19] Thus, a railroad company issuing a ticket may show by parol that so far as the ticket covered connecting lines it acted only as agent and assumed no responsibility, although the ticket contains no notice to this effect.[20] A statement by a ticket agent in selling a ticket that the passenger may not be able to travel on a certain train does not curtail his rights as expressed in the ticket,[21] but declarations of a ticket agent

fact against his title, but not conclusive. Johns v. Church, 12 Pick. (Mass.) 557. The court liken the case to a man's taking a lease, for a year, of his own lands. During the year he shall not question the title of his landlord, but after that he may. It clearly appeared, however, in this case, that the sheriff had notice of the defendant's claim, both when the receipt was given and when the property was delivered in pursuance of the receipt. Had there been no notice of the kind before suit brought, it may be questionable whether the action could have been maintained. It seems that, in cases like that, even if the property has not been delivered, and an action is brought on the receipt, the defendant may show his title, and that the sheriff had notice of it at the time of taking the receipt, in mitigation of damages, but not otherwise. Bursley v. Hamilton, 15 Pick. (Mass.) 40.

A receipt for the purchase-money of a slave, containing a warranty of soundness, and accompanied by an order on a third person for the delivery of the slave, was held to exclude parol evidence for the purpose of showing the intention of the parties to be, that the title to the slave was not to vest in the purchaser till the slave was *actually* delivered. Franklin v. Long, 7 G. & J. (Md.) 407.

A creditor, on a compromise with his debtor, took the note of A. for an amount less than his debt, by way of payment, and indorsed on a note he held against the debtor an acknowledgment of the receipt of A.'s note as a compromise for the full payment of the debtor's note. It was held that, in an action subsequently brought by the creditor against the debtor, the former could not give parol evidence that, in addition to A.'s note, a further sum was agreed to be paid him by the debtor. Kellogg v. Richards, 14 Wend. (N. Y.) 116.

Where a receipt was of a sum *for safe keeping*, it was held that it could not be contradicted by evidence that the money was *paid*. Tisloe v. Graefer, 1 Blackf. (Ind.) 353. Nor can the *legal effect* of special receipts in the nature of a contract be varied by parol. Stone v. Vance, 6 Hamm. (Ohio) 246.

[17] Lord v. American Mutual Accident Association, 89 Wis. 19, 61 N. W. 293, 46 Am. St. Rep. 815.

[18] Butler v. State, 81 Miss. 734, 33 So. 847.

[19] Ames v. Southern Pac. Co., 141 Cal. 728, 75 Pac. 310.

[20] Pennsylvania Co. v. Loftis (Ohio, 1905), 74 N. E. 179.

[21] Illinois Central R. Co. v. Harris, 81 Miss. 208, 32 So. 309.

as to stop-over privileges are binding where the ticket purchased did not cover the points inquired about.[22]

As between the conductor and the passenger, the ticket is the conclusive evidence of the passenger's right to travel, and in an action for wrongful expulsion parol evidence to vary it is inadmissible.[23]

Sec. 23. Surrounding Circumstances.

The rule that *parol evidence is admissible to explain and apply a writing, where it does not contradict or vary it,* is universal in its application, and is in accordance with another rule which is well recognized, that *a writing may be read in the light of surrounding circumstances, in order that the true intent and meaning of the parties may be arrived at,*[24] and that independent and collateral facts, about which the contract is silent, may be shown by parol.[25]

The surrounding circumstances, and subsequent conduct and acts of the parties, are material and competent to show the interpretation which they put on an agreement, and what conditions they have waived.[26]

[22] Illinois Cent. R. Co. v. Harper, 83 Miss. 560, 35 So. 764.

[23] Rolfs v. Atchison, T. & S. F. Ry. Co., 66 Kan. 272, 71 Pac. 526.

[24] In Robinson v. Barnett, 18 Fla. 602, at the maturity of a note the holder demanded payment of the apparent indorser, but he refused, alleging that the indorsement was forged, but to save the expense of protest, he wrote over the indorsement the words "protest waived," and in an action against him evidence of these facts was held admissible. Emery v. Webster, 42 Me. 204; Knight v. N. E. Worsted Company, 2 Cush. (Mass.) 271; Barnabee v. Suaer, 18 La. An. 148; Pierson v. Atlantic Bank, 77 N. Y. 304; Spencer v. Babcock, 22 Barb. (N. Y.) 326; Reader v. Helms, 57 Ala. 440.

[25] Keogh v. McNitt, 6 Minn. 513.

[26] Claims made by one party to a contract in repeated letters not denied by the other party till after part performance of the contract, are admissible to explain the understanding of the parties as is other conduct of the parties bearing on the contract. The preliminary correspondence of the parties and the knowledge of one party of the business of the other may be admissible as bearing on the intention of the parties in making the contract. Excelsior Wrapper Co. v. Messinger, 116 Wis. 549, 93 N. W. 459; Acker v. Bender, 33 Ala. 230; S. P. Cross v. Pearson, 17 Ind. 612; Emery v. Webster, 42 Me. 204; Grant v. Lathrop, 23 N. H. 67; Halsted v. Meeker, 15 N. J. L. 136; Haldeman v. Chambers, 19 Tex. 1; Conner v. Carpenter, 28 Vt. 237; Ratcliffe v. Allison, 3 Rand. (Va.) 537; Sigerson v. Cushing, 14 Wis. 527; Carmony v. Hoober, 5 Penn. St. 305. Evidence in explanation of an authentic act is admissible where it does not contradict, vary, alter, enlarge, or restrict the act. Barnabee v. Suaer, 18 La. An. 148. And, though not admissible to add to or vary the terms of a written contract, it is admissible to prove facts and

It is allowable also, in many instances, to show in evidence pre-existing and contemporaneous facts and circumstances attending the negotiations of the parties in making the contract, as such facts often throw light upon the disputed contract itself.[27] So the surrounding circumstances are admissible on the question whether

circumstances as to the relations of the parties, and the nature, quality, and condition of the property which is the subject of the contract; and also the acts of the parties at and subsequent thereto, for the purpose of showing their understanding of its terms. Knight v. New England Worsted Co., 2 Cush. (Mass.) 271. Thus, where upon a partition between co-heirs, a way is assigned to one, and upon the evidence it is uncertain which of two routes was intended, evidence is admissible of any circumstances or acts of the parties or of the commissioners indicating such intention. French v. Hayes, 43 N. H. 30. Such extrinsic facts, existing at the time a written contract is made, are admissible to aid in the interpretation of the instrument, although not to contradict it. Phelps v. Bostwick, 22 Barb. (N. Y.) 314; Spencer v. Babcock, id. 326. And in construing a written instrument, the situation of the parties and the nature and object of their transactions may be looked at; *but the court cannot give effect to any intention which is not expressed by the language of the instrument when looked at in the light of facts that are properly before the court.* Farmers' &c., Co. v. Commercial Bank, Wis. 424.

[27] Pierson v. Atlantic Bank, 77 N. Y. 304; Barnebe v. Suaer, 18 La. An. 148; Reader v. Helms, 57 Ala. 440.

A contract evidenced by letters to furnish to a railroad company all the ties it might need during a certain year may be explained by evidence of the surrounding circumstances to refer to ties it might need in constructing certain new lines only. Laclede Const. Co. v. T. J. Moss Tie Co., 185 Mo. 25, 84 S. W. 76. Parol evidence is admissible to show what incumbrances were intended to be included within a covenant "against all incumbrances." Gill v. Ferrin, 71 N. H. 421, 52 A. 558, where the grantee claimed that the covenant covered a mortgage which the grantee had agreed to assume and pay. The words "tenement house" in a deed executed in 1873 may be explained by testimony that an apartment house was not known at the time and was not intended to be included in the phrase. Kitching v. Brown, 180 N. Y. 414, 73 N. E. 241. Parol evidence is admissible to show that the two grantees in a deed were husband and wife, and therefore took an estate by entireties. McLaughlin v. Rice, 185 Mass. 212, 70 N. E. R. 52. Where an insurance policy is silent as to the method or tables by which the insurance is to be calculated parol evidence is competent to show what tables were then in use by the company for it must be presumed that the parties contracted with reference to the tables adopted by the company and then in use by it. After the policy was issued the company was not at liberty to adopt another table less favorable to the assured. Providence Savings Life Assurance Society of New York v. Bailey (Ky., 1901), 80, S. W. 452.

In Coml. Bank of Albany v. Clark, 28 Vt. 325, the defendant was sued as indorser of a bill of exchange. The notice of its dishonor was proved by his written acknowledgment that he did receive due and legal notice of the protest and non-payment of the bill. The question in the case was, whether this written acknowledgment was conclusive, or whether he could show that in fact no such notice of protest was ever given, *he having signed the admission under a misapprehension of the facts.* The court held that there was nothing in the case to render the testimony inadmissible. See, also, Sigerson v. Cushing, 14 Wis. 527; Lyon v. Kidder, 48 Vt. 42.

a certain contract is illegal as in restraint of trade.[28] Mr. Wigram[29] says, "Every claimant under a will has a right to require that a court of construction in the execution of its office shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare;" and this rule applies with equal force to all classes of instruments, as all writings are presumed tacitly to refer to the circumstances existing when they were made,[30] and it is upon this principle that evidence of customs and usages is admitted in aid of the interpretation of instruments, as "the law is not so unreasonable as to deny to the *reader* of any instrument the same light which the *writer* enjoyed," bearing in mind, however, that a writing cannot be added to or cut down by the testimony of witnesses.

Sec. 24. To Prove Collateral Matters.

Parol evidence may be said to be primary where the writing is not admissible to prove the facts to establish which the oral proof is offered,[1] or where it is offered to establish a matter collateral to or distinct from the writing,[2] as, the consideration, or failure of the consideration, of a guaranty,[3] note,[4] or other contract[5] or obligation,[6] where the consideration is not specifically stated in the instrument.[7] Also where the ownership of land is a collateral matter parol evidence is sufficient to prove it.[8] So, in a suit by a traveller on a railroad against the company for personal injuries, evidence that he had a ticket or transfer is sufficient to prove himself a passenger without producing the original ticket, where the contents of his ticket is not in issue, but only the question whether he had a ticket.[9] Such evidence is admissible to identify the subject-

[28] Detroit Salt Co. v. National Salt Co., 134 Mich. 103, 96 N. W. 1.

[29] Wigram on Extr. Ev. 59, 138.

[30] Wigram on Extr. Ev. 57. As to wills, see Bradbury v. Jackson, 97 Me. 449, 54 A. 1068, 1071.

[1] Sparks v. Rawls, 17 Ala. 211.

[2] Shiel v. Starke, 14 Ga. 429.

[3] Nichols v. Bell, 1 Jones (N. C.) L. 32.

[4] Long v. Davis, 18 Ala. 801; Beckels, v. Cunningham, 14 Miss. 358; Smith v. Crooks, 18 Ga. 440; Herrick v. Bean, 20 Me. 51.

[5] Cowan v. Cooper, 41 Ala. 187.

[6] Andrews v. Andrews, 12 Ind. 348; Groesbeck v. Seeley, 13 Mich. 329; Estabrook v. Smith, 6 Gray (Mass.) 572; Harwood v. Harwood, 22 Vt. 507.

[7] Wood v. Beach, 7 Vt. 522; Merle v. Matthews, 26 Cal. 455; White v. Weeks, 1 Penn. 486; Myer v. Casey, 57 Miss. 615; Cornell v. Markham, 19 Hun (N. Y.), 275; De Lavalette v. Wendt, 75 N. Y. 579.

[8] Garrison v. Glass, 139 Ala. 512, 36 So. 725.

[9] Elgin J. & E. Ry. Co. v. Thomas (Ill., 1905), 74 N. E. 109; Chicago

matter of the contract or deed or other instrument, and apply it thereto,[10] where the instrument itself does not sufficiently show to which of two or more things it applies.

Parol evidence is also admissible to prove matters collateral to the agreement which are not repugnant therewith. Thus, while it is a well-settled rule that parol evidence cannot be admitted to contradict or vary the terms of a written instrument, and that a conveyance cannot be shown by parol to be to another use or intent than that expressed in it, yet parol evidence may be admitted *to prove a collateral agreement with stipulations in a deed, and in no respect repugnant to it.* So, an oral agreement whereby the owner of land agreed to construct streets in consideration the buyer would buy the land and build a house on it, may be proved as collateral to the written agreement for the sale of the land.[11] It is competent to show by parol that a grantee in a deed agreed to pay a mortgage on the land.[12] A mortgage or pledge of certain warehouse receipts to secure a note may be extended by evidence that it was orally agreed that the surplus proceeds of the receipts should be applied to other notes owed by the pledgor to the pledgee.[13] A court of equity, in a suit to restrain the enforcement of a mortgage note, may admit evidence to show a collateral agreement that the note was not to be enforced so long as the mortgagor bought of the mortgagee.[14]

An oral agreement made before the execution of a lease that if, during the term, the lessee should take a lease of another store of the lessor and should vacate the store first leased the lessor would thereupon surrender all rights under the lease is ineffective as contradicting the lease.[15] Where a party contracts to sell all his stock in a corporation, said holdings "amounting to three-fifths of the

City Railway Co v. Carroll, 206 Ill. 318, 68 N. E. 1087.

[10] Norris v. Shafford, 127 Mass. 85; Chicago Dock, &c., Co. v. Kinzie, 93 Ill. 415; Hannah v. Shirley, 7 Oregon, 115; Ames v. St. Paul, &c., R. R. Co., 12 Minn. 412; Barnhardt v. Riddle, 23 Penn. St. 93; Hildebrand v. Tagle, 20 Ohio, 147; Gould v. Lee, 55 Penn. St. 99; Robinson v. White, 42 Me. 209; McGregor v. Brown, 5 Pick. (Mass.) 170; Hardy v. Matthews, 38 Mo. 121.

[11] Drew v. Wiswall, 183 Mass. 554, 67 N. E. R. 666. See, also, Durkin v. Cobleigh, 156 Mass. 108, 30 N. E. 474, 32 Am. St. Rep. 436.

[12] Mowry v. Mowry (Mich., 1904), 100 N. W. 388.

[13] Lewis v. First Nat. Bank (Ore., 1904), 78 Pac. 990.

[14] O'Brien v. Paterson Brewing & Malting Co. (N. J. Ch., 1905), 61 A. 437.

[15] Taylor v. Goding, 182 Mass. 231, 65 N. E. R. 64.

entire capital stock," parol evidence is inadmissible to show that he was to sell only such stock as he owned.[16]

And generally it may be said that *parol proof of any collateral parol agreement may be given, which does not interfere with the terms of the written contract, although it may relate to the same*

[16] Dady v. O'Rourke, 172 N. Y. 447, 65 N. E. R. 273.

As where A., B. and C. were partners, and A., without consulting his copartners, acting as the agent of D., his brother, fraudulently applied some of the funds of the partnership to the use of D., and D., by his deed, reciting that A. was largely indebted to B. and C., which indebtedness he had agreed to discharge, etc.,—it was held, that the amount of this indebtedness, which was not stated, might be shown by parol evidence. Pomery v. Manin, 2 Paine (U. S.), 476.

So, too, where an agreement is entered into between two or more sureties or indorsers on a note that they will divide the loss between them, in an action by the one who has paid the note against the other upon such agreement, parol evidence is admissible to prove it. Phillips v. Preston, 5 How. (U. S.) 278. In Indiana (Harvey v. Millier, 67 Ind. 90) it has been held that the grantor of land, who has sold it by warranty deed, may, although the grantee entered into possession at once, and although the deed contained no mention thereof, show a parol reservation of a growing crop (Overruling Chapman v. Long, 10 Ind. 465); and in Pennsylvania (Heysham v. Dettre, 89 Penn. St. 506) it has been held that parol evidence is admissible to show that a heater and gas fixture were to pass to the purchaser of a house, under a written agreement in which no mention was made of such articles.

So, too, it has been held that, *as between an indorser and his immediate indorsee*, oral evidence is competent to show a waiver of demand and notice of non-payment at the time of indorsing in blank. Dye v. Scott, 35 Ohio St. 194; 35 Am. Rep. 604. See § 37, *post*. See, also, Davis v. Morgan, 64 N. C. 540; Mendenhall v. Davis, 72 id. 150, in which it was held that parol evidence is admissible to annex qualifications, or a special contract even, as between the immediate parties under a blank indorsement. But such evidence is not admissible as against third persons into whose hands the note may pass in due course of business, because *they* have a right to rely upon the obligation which the law implies from a blank indorsement, and are not bound by any private contract or arrangement made between other parties to the note, which does not appear thereon. Dye v. Scott, *ante*. This doctrine is not, apparently, in accordance with the general drift of the authorities (Bartlett v. Lee, 33 Ga. 491; Bank of U. S. v. Dunn, 6 Pet. [U. S.] 51; Dale v. Gear, 38 Conn. 15), but it seems to us that neither its justice or soundness can be questioned, as the only effect of the evidence is to show a waiver by one party of a legal right, and not an addition to, or alteration of, the contract itself; and that a waiver of a right may be proved by parol, whether arising under a contract, deed, or by operation of law, has been repeatedly held by our courts. Ruffinsberger v. Callison, 28 Penn. St. 426; Willey v. Hall, 8 Iowa, 62; Wood v. Perry, 1 Barb. (N. Y.) 114; Bryan v. Hunt, 4 Sneed (Tenn.), 543; Chiles v. Jones, 8 B. Mon. (Ky.) 51; Parker v. Syracuse, 31 N. Y. 376; Leathe v. Bullard, 8 Gray (Mass.), 545; Medomok Bank v. Curtis, 24 Me. 36. But, of course, such a waiver is only effectual, so far as a *negotiable* instrument is concerned, between the immediate parties to the agreement. Nor is evidence of any collateral agreement admissible even between the parties, which in any manner varies or changes the terms of the contract. Thus, evidence is not admissible to show that the payee of a note, at the time of transferring it by indorsement, orally agreed to assume the

subject-matter.[17] Where the parol agreement is merely collateral to the principal agreement, and independent of it, it may be made the ground of an action for recoupment or abatement of damages, and may be established by parol.

Sec. 25. To show that Writing never legally existed. (Fraud, Illegality, Escrow, etc.)

The extrinsic evidence thus far considered has been directed in various ways toward the variation or explanation of an acknowledged writing and is not to be confused with evidence discussed in this section introduced to show that the writing never legally existed on account of fraud, illegality or other reason, which latter species of evidence is always admissible if competent. The rule excluding proof to explain, vary or control a written contract does not apply, even in a court of law, where it is claimed that a material part of it has been inserted by the fraud of one of the parties,[1] or that a material part of the contract was *omitted* by the

payment of it absolutely and unconditionally (Rodney v. Wilson, 67 Mo. 123, 29 Am. Rep. 499; Doolittle v. Ferry, 20 Kan. 230, 27 Am. Rep. 166), nor that it was agreed between them that the indorsers should not be liable. Hill v. Shields, 81 N. C. 250.

[17] Ruggles v. Swanwick, 6 Minn. 526; Joannes v. Mudge, 6 Allen (Mass.), 245.

Thus, in a Massachusetts case (Carr v. Dooley, 119 Mass. 294), at the time of the negotiation for the purchase of land, a sewer was in process of construction in the street on which the land abutted. The purchaser called the owner's attention to it, and asked him who was to pay for the sewer, to which the owner replied that he would, and that the other party should not be called upon to pay a cent for it. A deed of the land was subsequently given, with the usual covenants of warranty, but no mention was made of the sewer. The purchaser afterwards paid an assessment for the construction of the sewer, and in an action by him against his grantor to recover the amount paid, it was held that evidence of the conversation and existing circumstances was sufficient to prove the promise, and that it was not open to the objection that it varied or enlarged the written instrument. See, also, McCormick v. Cheevers, 124 Mass. 262.

[1] Baltimore, &c., Steamboat Co. v. Brown, 54 Penn. St. 77; Townsend v. Cowler, 31 Ala. 428; Holbrook v. Burt, 22 Pick. (Mass.) 546; Hamilton v. Conger, 28 Ga. 276; Stark v. Littlepage, 4 Rand. (Va.) 368; Gatling v. Newell, 9 Ind. 572; Hunter v. Bilgen, 30 Ill. 228; Farrell v. Bean, 10 Md. 217; Sanford v. Handy, 23 Wend. (N. Y.) 260; Davis v. Stern, 15 La. An. 177; Hunt v. Carr, 3 Iowa, 581; Selden v. Myers, 20 How. (U. S.) 506; Van Buskirk v. Day, 22 Ill. 260; Harrell v. Hill, 19 Ark. 102; Mallory v. Leach, 36 Vt. 156. But it is not proper to show that the parties agreed that the writing should be a sham. Connor v. Carpenter, 28 Vt. 237. It is proper to show that the party's signature was procured by fraud. Lull v. Cass, 43 N. H. 62; Christ v. Diffenbach, 1 S. & P. (Penn.) 464; Prentice v. Russ, 16 Me. 30. This rule applies as well to deeds or other instruments under seal as to simple contracts, and

fraud of one of the parties;[2] or that the writing has been altered in a material respect.[3]

The object is to show that no such contract as is sued upon was ever entered into by the party sued.[4] If a material part has been inserted or omitted by the fraud of one of the parties, this furnishes an exception to the rule, and parol proof is admissible to establish the fact.[5] The effect of this evidence is to show that the

a deed may be avoided by showing that it was misread or its purport falsely declared to the grantor at the time of its execution. Doe v. Farlee, 22 N. J. L. 289; Anthony v. Wilson, 14 Pick. (Mass.) 303; Farmers', &c., Bank v. Whinfield, 24 Wend. (N. Y.) 419; Chestnut Hill, &c., Co. v. Chas, 14 Conn. 123; or according to some of the cases that its execution was obtained by fraudulent misrepresentations as to the consideration of the instrument. Bliss v. Thompson, 4 Mass. 492; Somer v. Skinner, 16 id. 348; Hazard v. Erwin, 18 Pick. (Mass.) 95; Hoitt v. Halcomb, 23 N. H. 535; Chew v. Moffatt, 6 Munf. (Va.) 120; Leonard v. Bates, 1 Blackf. (Ind.) 172; but *contra*, see Vrooman v. Phelps, 2 John. (N. Y.) 177; Taylor v. King, 6 Munf. (Va.) 358; Donaldson v. Barton, 4 D. & B. (N. C.) 435; Rogers v. Colt, 1 N. J. L. 714.

[2] Chitwood v. Brittain, 2 N. J. Eq. 438; Phyfe v. Wardwell, 2 Edw. Ch. (N. Y.) 47; Watkins v. Stockett, 6 H. & S. (Md.) 435; Blanchard v. Moore, 4 J. J. Mar. (Ky.) 471; Elliott v. Connell, 13 Miss. 91; Anderson v. Bacon, 1 A. K. Mar. (Ky.) 48.

[3] Buck v. Appleton, 14 Me. 284.

"*It is not every representation*, untrue in itself, made in the course of negotiations leading to a contract, which will justify or authorize a rescission of the contract. As a general rule, it has long been the doctrine prevailing in this court that the misrepresentation of material facts, on which the party acting relies and has the right to rely, whether made wilfully and intentionally or innocently from ignorance, inadvertance, or mistake, will avoid a contract it may have induced. But these and all our decisions hold that, in the absence of a relation of trust and confidence, or of some other peculiar fact or circumstance, a misrepresentation of matter of law, or of matter of judgment equally open to the observation or inquiries of both parties, or of mere opinion, will not vitiate a contract." Rutter & Hendrix v. Hanover Fire Ins. Co., 138 Ala. 202, 35 So. 33, citing Georgia Home Ins. Co. v. Warten, 113 Ga. 479, 22 So. 288.

If a person who cannot read or write, or who cannot speak or read the language in which a note or other obligation is written, is induced to place his signature thereto upon the assurance by the other party that it is an instrument of a different character from what it in fact is, or that it contains provisions of a different character from what it in fact does contain, parol evidence is admissible to show the facts, not to vary or control the writing, but to show that no such contract was in fact entered into, and such evidence is no more obnoxious to the general rule excluding parol evidence than is evidence to show that a party's signature to the instrument is a forgery.

[4] Van Buskirk v. Day, 22 Ill. 260; Christ v. Diffenbach, 1 S. & R. (Penn.) 464; Champion v. White, 5 Cow. (N. Y.) 508.

[5] Waddell v. Glaseell, 18 Ala. 561; Bottomley v. United States, 1 Story (U. S. C. C.), 135; Townsend v. Cowler, 31 Ala. 428; Lunday v. Thomas, 26 Ga. 538; Pierce v. Wilson, 34 Ala. 596; Hamilton v. Congers, 28 Ga. 276; Gatling v. Newell, 9 Ind. 572; Stannard v. McCarty, 1 Morr. (Iowa) 124; Hunt v. Carr, 3 Iowa, 581; Akin v Drummond, 2 La. An. 92; Morris v. Terrenoire, id. 458; Williams v. Vane, id. 908; Rachal v. Rachal, 4 id. 500; Gayoso v. Dela-

writing is void or that it never had any legal existence.[6] Thus, parol evidence is admissible to show that a contract was procured by fraud.[7]

So, a party may show that he was induced to execute a written agreement by fraudulent representations affecting the consideration,[8] and evidence is admissible to show that a release was obtained by fraud, and on this question the circumstances of the parties are admissible in evidence.[9] In an action to recover money paid on account of a written contract the plaintiff may introduce evidence that he was induced to enter into the contract by misrepresentations of the defendant.[10] Evidence of a contemporaneous oral agreement is admissible only on proof that it was omitted from the written contract by fraud, accident or mistake.[11]

The same rule prevails as to illegality, and parol evidence is admissible to show that a written contract was entered into for an illegal object forbidden by statute, by common law, or by the general policy of the law.[12] Parol testimony is always permissible to show that a paper is but a cover for usury, penalty, forfeiture or other illegal advantage to one of the parties. So, a contract providing for payments of certain sums designated as rental on the completion of which payments a deed was to be given may be shown to be really a contract for sale with a penalty.[13] So, a contract of a customer with a stock broker may be varied by oral evi-

roderie, 9 id. 278; Davis v. Stern, 15 id. 177; Garrett v. Crooks, id. 483; Barbin v. Gaspard, id. 439; Farrell v. Bean, 10 Md. 217; Holbrook v. Burt, 22 Pick. (Mass.) 546; Sanford v. Handy, 23 Wend. (N. Y.) 1260; Bartle v. Vasbury, 2 Grant (Penn.), Cas. 277; Hunter v. Bilyen, 30 Ill. 228; Baltimore, &c., Steamboat Co., v. Brown, 54 Penn. St. 77; Stark v. Littlepage, 4 Rand. (Va.) 368. In equity, parol evidence is admissible to prove fraud, or mistake, or surprise in a written agreement. But the evidence must be strong and clear. Hunt v. Rousmanier, 8 Wheat. (U. S.) 174; McMahon v. Spankler, 4 Rand. (Va.) 51. Parol testimony is admissible to show that the party was fraudulently deceived and misled as to the contents of the written instrument. Selden v. Myers, 20 How. (U. S.) 506.

[6] Paxton v. Popham. 9 East 421; Collins v. Blantern, 2 Mils. 341; Martin v. Clarke, 8 R. I. 389; Leppoe v. Nat'l Union Bank. Md. 136.

[7] Howie Bros. v. Walter Platt & Co., 83 Miss. 15, 35 So. 216; O'Connor v. Lightbizer, 34 Wash. 152, 75 Pac. 643.

[8] Machin v. Prudential Trust Co., 210 Penn. St. 253, 59 A. 1073.

[9] Kan. City, M. & B. R. Co. v. Chiles (Miss., 1905), 38 So. 498; Glisson v. Paducah Ry. & Light Co. (Ky., 1905), 87 S. W. 305.

[10] Rambo v. Patterson, 133 Mich. 655, 95 N. W. 722.

[11] Krneger v. Nicola, 205 Penn. 38, 54 A. 494.

[12] Friend v. Miller, 52 Kan. 139, 34 P. 397, 39 Am. St. Rep. 340.

[13] Lytle v. Scottish American Mortgage Co. (Ga., 1905), 50 S. E. 402.

dence of the real understanding of the parties to show that it was really void as a wagering contract.[14]

It may be said that parol proof is admissible to show that a written contract, though clothed in due form, and conferring apparently a just right, contravenes a prohibitory law in the interest of public morals, and so is a nullity. Indeed, parol evidence is admissible whenever the obligation is one contracted *in fraudem legis*. It is immaterial what form may have been given to the reprobated contract.[15]

Circumstances which go to show that a deed or other written instrument was never duly executed by the party, may always be shown, as that the writing was misread, or that one instrument was substituted for another, and thus, that his signature thereto was fraudulently obtained,[16] or that in reading the instrument, a material part of it was suppressed,[17] or indeed any act of the other party which amounted to such a fraud upon the party executing the instrument, that it is not the instrument which he designed to execute.[18] But in the absence of misrepresentation or trick or deception concerning the execution of a paper, it is not open to a party who has signed it to claim that he had not read it, as he was "somewhat hurried," and therefore that he was not bound by it.[19] Where names are signed in a blank book and articles of copartnership are afterwards inserted in the book, or are in a different place in the book, parol evidence is admissible to show that one so signing did not intend to sign the partnership articles.[20] Oral evidence is admissible to show that the defendant signed a certain order for

[14] Wheeler v. Metropolitan Stock Exchange, 72 N. H. 315, 56 A. 754.

In an early case, Collins v. Blantern, *ante*, it was established that illegality may be pleaded as a defense to an action upon a deed, and consequently to *any* contract, whether under seal or not: and in a later case (Paxton v. Popham, *ante*) it was held that an obligor of a bond may show that it was given upon an illegal consideration, *whether consistent with the condition of the bond or not*.

Thus, the State may show, in a contest for a succession with a duly acknowledged natural child, that the latter is the offspring of an adulterous connection. Succession of Fletcher, 11 La. An. 59.

[15] Lazare v. Jacques, 15 La. An. 599.

[16] Owen's Case, 1 Bland Ch. (Md.) 391; Van Valkenburgh v. Rourk, 12 John. (N. Y.) 337; Swisher v. Williams, 37 Penn. St. 754.

[17] Morton v. Chandler, 8 Cow. (N. Y.) 10; Franchot v. Leach, 5 id. 508; Creery v. Holly, 14 Wend. (N. Y.) 26; Tribble v. Oldham, 5 J. J. Mar. (Ky.) 141.

[18] Savage, J., in Franchot v. Leach, *ante*.

[19] Atchison, T. & S. F. R. Co. v. Vanordstrand, 67 Kan. 386, 73 Pac. 113.

[20] Moore v. May, 117 Wis. 192, 94 N. W. 45.

goods only for another party, and on the express understanding that he should not be liable on it.[21]

Upon the same principle, parol evidence is admissible to show that at the time when the instrument was executed, the party executing it had not the capacity to do so, in order to negative the idea that it is his deed or contract,[22] as that he was a lunatic;[23] or so intoxicated as not to know what he was doing;[24] or that it was executed under duress;[25] or that the party was under some legal disability, as coverture[26] or infancy.[27]

Parol evidence is always admissible to show that a contract was delivered conditionally and never became operative.[28] So, parol evidence is admissible to show that an offer apparently unconditional was delivered by the defendant to the plaintiff only on condition that other creditors should make the same agreement.[29]

In the case of unsealed instruments, parol evidence is competent between the original parties to prove that a paper perfect on its face, whether negotiable or not, was payable to the payee or any other person on condition that it was not to take effect except in a given event or upon a given condition, or was only to be used for a given purpose. As to sealed instruments, if a bond is perfect on its face and the delivery is by the sole obligor, or by all the obligors, to the obligee, the delivery is absolute, and the condition void. Such a bond cannot be so delivered in escrow to the obligee, and parol evidence is inadmissible to affect its validity. The above observations are applicable where the bond is perfect on its face. If imperfect, parol evidence is admissible to show the conditions, no matter by whom delivered; the instrument itself affecting the obligee with notice of its incompleteness.[30] Evidence is admissible to show that a written contract was to have no force unless certain

[21] Hackney v. McKee, 12 Okl. 401, 75 Pac. 535.

[22] Champion v. White, 5 Cow. (N. Y.) 510.

[23] Dale v. Roosevelt, 9 Cow. (N. Y.) 310; Den v. Clark, 10 N. J. L. 217; Grant v. Thompson, 4 Conn. 203; Jackson v. King, 4 Cow. (N. Y.) 207; Mitchell v. Kingman, 5 Pick. (Mass.) 481.

[24] Dale v. Roosevelt, *ante;* Barrett v. Buxton, 2 Aik. (Vt.) 167; Prentice v. Osborn, 2 Paige Ch. (N. Y.) 31; Rice v. Peat, 15 John. (N. Y.) 503.

[25] Worcester v. Eaton, 13 Mass. 371; Stauffer v. Latstraw, 2 Watts (Penn.), 165; Burrougs v. Richman, 1 Me. 233; Richardson v. Duncan, 3 N. H. 508; Jackson v. Myers, 11 Wend. (N. Y.) 536.

[26] Dale v. Roosevelt, *ante.*

[27] Van Valkenburgh v. Rourk, 12 John. (N. Y.) 338.

[28] McCormick Harvesting Mach. Co. v. Morlan, 121 Iowa, 451, 96 N. W. 976.

[29] Elastic Tip Co. v. Graham, 185 Mass. 597, 71 N. E. 117.

[30] Blair v. Security Bank of Richmond, 103 Va. 762, 50 S. E. 262.

conditions were fulfilled,[31] and contemporaneous conversation and agreements of the parties are admissible on the question of the execution of a contract where it is claimed that it was executed conditionally only.[32]

If a deed with the regular evidence of complete and unqualified execution on its face, has been signed, sealed and delivered to the party, parol evidence of a contemporaneous agreement or understanding that it should not take effect until a certain event, is inadmissible, as going to vary the terms of the deed, and make that conditional which appeared to be absolute.[33]

Parol evidence is admissible to show that a contract was not to take effect until the happening of a condition precedent, but cannot be used to show that the contract took effect but was made void by the happening of a condition subsequent.[34] It is not competent to establish, under pretense of delivery as an escrow, conditions in the contract itself, different from its face, and repugnant to it.[35] So, a guarantor on an absolute guaranty may not show by parol that he understood that the sum guaranteed was to be paid only out of a certain fund.[36]

[31] O'Connor v. Lightbiger, 34 Wash. 152, 75 Pac. 643.

[32] Wilbur v. Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568.

[33] Whitney v. Dewey (Idaho, 1905), 80 Pac. 1117; Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576; Ward v. Lewis, 4 Pick. (Mass.) 518; Dix. v. Otis 5 id. 38; *contra*, Titus v. Myers, 11 Wend. (N. Y.) 536.

[34] Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174; State v. Chamber of Commerce, 121 Wis. 110, 98 N. W. 930, where evidence was admitted to show that a sale of stock was not to be effective in case the stock had already been sold by one having a power of attorney to sell it. For a like decision on the same facts see Reiner v. Crawford, 23 Wash. 669, 63 P. 516, 83 Am. St. Rep. 848.

"Where conditions subsequent are to be performed in order to render the note or bond operative, and when operative the written instrument is expressive of the entire contract, then it must be delivered to a third person, or the delivery to the obligee in escrow will be a good delivery, and the instrument cannot be contradicted by parol varying its terms. It is a completed contract, subject to conditions subsequent not in writing. But where the delivery would defeat the real contract between the parties, then it is competent to prove by parol (1) the whole contract, and that the writing was only a part of the contract; or (2) to explain the consideration; or (3) to show that it was part of the contract that the writing was delivered, but not to become operative until another part of the contract—condition precedent—was fulfilled." So parol evidence should be admitted to show that a certain note was executed on the understanding that it would not be binding except if a certain policy when it arrived was satisfactory and accepted by the maker of the note. Graham v. Remmel (Ark. 1905), 88 S. W. 899.

[35] State v. Perry, 1 Wright (Ohio.), 662.

[36] McKee v. Needles, 123 Iowa 195, 98 N. W. 618.

A surety in a joint and several bond, it has been held, may, when sued, show that he signed it on con-

Sec. 26. Consideration.

As a general rule, the consideration of a contract is open to inquiry as between the original parties, and even the consideration of a deed may be inquired into when the principles of justice require it. But this rule is applicable only where the statement as to the consideration in the contract is merely by way of recital. The consideration may be so referred to in the contract as to make it one of its terms and conditions. When this is true, parol evidence is not admissible to vary the term, although the term relates to the consideration. In a written contract which carries on its face mutual promises, terms and conditions expressed on one side may be the consideration for terms and conditions expressed on the other. In such a case proof of a consideration different from that expressed in the written instrument might alter its terms and conditions, and, if it would, it is inadmissible.[1] The consideration cannot be varied by parol when thereby the legal effect of the instrument to pass the interest therein designated would be defeated.[2] The true consideration for a release or other written contract may always be shown when the consideration is set forth as $1.00,[3] or is indefinite.[5]

The *want or failure of consideration* may also be proved by parol evidence showing that the written agreement is not binding,[6]

dition that others, besides those whose names are signed to it, would execute it, and that their signatures were not procured. United States v. Leffler, 11 Pet. (U. S.) 86. The principal was intrusted to procure the signatures in this case, and it does not appear that the obligees were in any manner apprised of the conditional delivery. In Louisiana a similar point arose, and the court held, that as there was nothing on the face of the bond showing that other signatures were intended, the surety could not avail himself of the breach of trust on the part of the principal, to defeat a recovery by the obligees. Police Jury v. Haw, 1 Mill. (La.) 41.

[1] Wellmaker v. Wheatley (Ga., 1905), 51 S. E. 436.

[2] Where a partnership dissolution agreement recites that it is made for value evidence that it was made without consideration simply to enable the transferee to carry on the business more conveniently is inadmissible. Arnold v. Arnold, Cal. , 70 Pac. 23.

[3] Anderman v. Meier, 91 Minn. 413, 98 N. W. 327.

Where a written memorandum of sale of valuable goods is signed, stated to be "in consideration of $1.00." parol evidence is admissible to show that it was orally agreed that $200 should be paid down and that on the failure of the buyer to pay the $200 the seller declared the sale off. Schwarz v. Lee Gon (Ore., 1905), 80 Pac. 110.

[5] Burk v. Mead, 159 Ind. 252, 64 N. E. R. 880.

[6] Bickels v. Cunningham, 14 Miss. 358; Long v. Davis, 18 Ala. 801; Herrick v. Bean, 20 Me. 51; Smith v. Brooks, 18 Ga. 440; Great Western Ins. Co. of Aurora v. Cobb, 21 Ind. 492; Collier v. Mahan, 21 id.

unless it is under seal, which, in the absence of fraud, is conclusive evidence of a sufficient consideration.[7] But if *no* consideration is stated in the deed or contract, the party will be allowed to prove one by extrinsic evidence;[8] and if the deed is expressed to be made "for divers good considerations," it may be averred and proved by parol that the bargainee gave money for his bargain.[9]

It was formerly the rule that if an instrument *under seal* specifies any particular consideration, as, for instance, love and affection, and omits all mention of any other consideration, no extrinsic proof of another can in general be given, because such proof would contradict the deed.[10]

110. A person cannot, under the guise of proving the consideration of a contract by parol, add to or subtract from the written contract in any of its provisions. Howe v. Walker. 4 Gray (Mass.), 318; Munde v. Lambie, 122 Mass. 336; Foster v. Jolly, 1 C., M. & R. 707; Solly v. Hinde, 2 Cr. & M. 516; Abbott v. Hendricks, 1 M. & Gr. 791.

[7] Holbrook v. Holbrook, 30 Vt. 432; Johnson v. Bayles, 26 Ala. 576; Morris, &c., Co. v. Ryerson, 27 N. J. L. 457; Morse v. Shattuck, 4 N. H. 229; Kumler v. Ferguson, 7 Minn. 442; Swafford v. Whipple, 3 Iowa, 261; Lawton v. Buckingham, 15 id. 22; Emmons v. Littlefield, 13 Me. 233; Bennett v. Solomons, 6 Cal. 134; Strawbridge v. Cartledge, 7 Watts (Penn.), 394; Ely v. Alcott, 4 Allen (Mass.), 506; Jones v. Jones, 12 Ind. 389.

[8] Peacock v. Monk, 1 Ves. Sr. 128; Merle v. Matthews, 26 Cal. 455; Wood v. Beach, 7 Vt. 52; Frink v. Green, 5 Barb. (N. Y.) 455; White v. Weeks, 1 Penn. 486.

[9] 2 Ph. Ev. 353; Tull v. Parlett, M. & M. 472; Benedict v. Lynch, 1 John. Ch. (N. Y.) 370; Chesson v. Pettijohn, 6 Ired. (N. C.) L. 121; Pomeroy v. Bailey, 43 N. H. 118; Norris v. Ham, R. M. Charlt. (Ga.) 267.

[10] Peacock v. Monk, 1 Ves. Sr. 128; Gale v. Williamson, 8 M. & W. 408; Ellinger v. Crowl, 17 Md. 361; Harrison v. Castner, 11 Ohio St. 339; Thornburgh v. Newcastle, &c., R. R. Co., 14 Ind. 499; Mead v. Steger, 5 Port. (Ala.) 498; Hendricks v. Crowley, 31 Cal. 471; Lutburrow v. Henderson, 30 Ga. 482. A recital in a note that it was given for the purchase-money of land may be contradicted by parol evidence, even between the parties. Hicks v. Morris, 57 Tex. 658; S. P. Lawe v. Thompson, 86 Ind. 503; Bragg v. Stanford, 82 id. 254.

Still, if the object is to establish or negative the existence of fraud, such proof will be admissible. Thus, where a conveyance purported to have been made in consideration of a certain sum and natural love and affection, in a suit to set it aside, extrinsic evidence was held admissible to show that the estates were worth much more than that sum, and that natural love and affection constituted no part of the real consideration. Filmer v. Gott, 7 Bro. P. C. 70; R. v. Scammonden, 3 T. R. 475. Parol evidence is held to be admissible to show a consideration in addition to that named in the deed. Vail v. McMillan, 17 Ohio St. 617; Hayden v. Meutzer, 10 S. & R. (Penn.) 329; Miller v. Goodwin, 8 Gray (Mass.), 542; Perry v. Central, &c., R. R. Co., 5 Caldw. (Tenn.) 138; Henderson v. Dodd, 1 Bailey (S. C.) Ch. 138. So, where a father assigned his house and personalty to his son by deed, "in consideration of natural love and affection," and afterwards the sheriff seized part of the personalty under a *fi. fa.* against the father, the son, in proceeding against the sheriff, was permitted to give evidence of a valuable consideration, and thus to rebut the presumption of fraud against creditors, which a deed made by a debtor in consideration of natural

But, it is now the well-settled rule in this country that although the actual consideration may be different in kind or amount from that named in the deed, or although the deed may contain no expressed consideration, the consideration may be proved by evidence *dehors* the deed.[11] Where the recital of consideration in a deed states a nominal sum, the true consideration may be shown,[12] or where the consideration in a deed is "love and affection and one dollar," it may be shown by parol that part of the consideration was a conveyance of an interest in land.[13] Where a deed is expressed to be in consideration of one dollar and of the grantee's agreement to pay the grantor's debts, the grantor may show that it had no debts, that the consideration expressed in the deed was merely nominal, and then may introduce parol testimony of the real consideration and show its failure.[14] Parol evidence is admissible to show that the real consideration for a deed was the agreement of the railroad company to erect a station on a neighboring piece of land,[15] or was a certain agreement between the grantor and grantee as to growing crops,[16] or was an agreement by a son to support his parents.[17] Parol evidence is admissible to show that at the time of a conveyance it was agreed that the consideration named in the deed should be paid only when the grantor had perfected his title,[18] or to show that the price of land was to depend upon its area, and that in computing this a mistake was made.[19] In a suit on a covenant of seisin in a deed, the defend-

love and affection *prima facie* imports. Gale v. Williamson, 8 M. & W. 405; Pott v. Todhunter, 2 Coll. C. R. 76; Drury v. Tremont Improvement Co., 13 Allen (Mass.), 168; Lamb v. Donovan, 19 Ind. 40; Gelpcke v. Blake, 19 Iowa, 263.

[11] Conklin v. Hancock, 66 Ohio, 455, 66 N. E. R. 519; Johnson v. Bean (Minn., 1904), 99 N. W. 893. (Purpose of deed to pass title merely and not state whole agreement of parties.) Collins v. Tillou's, Adm'r, 26 Conn. 368, 68 Am. Dec. 398; Henry v. Zurflieh, 203 Penn. 440, 53 A. 243, where the deed named $2,500 as the consideration and the grantor was allowed to testify that the real consideration was $4,500. McGary v. McDermott, 207 Penn. 620, 57 A. 46; Butt v. Smith, 121 Wis. 566, 99 N. W. 328. A written agreement for the sale of land is admissible to contradict the consideration named in a deed resulting from the agreement. Conklin v. Hancock, 67 Ohio, 455, 66 N. E. R. 518.

[12] Furst v. Galloway (W. Va., 1904), 49 S. E. 146.

[13] Edwards v. Latimer, 183 Mo. 610, 82 S. W. 109.

[14] Medical College Laboratory v. New York University, 178 N. Y. 153, 70 N. E. R. 467, 472.

[15] St. Louis & A. R. Co. v. Crandall (Ark., 1905), 86 S. W. 855.

[16] Breiterwischer v. Clough, 111 Mich. 6, 66 Am. St. Rep. 372, 69 N. W. 88.

[17] Halvorsen v. Halvorsen, 120 Wis. 52, 97 N. W. 494.

[18] Johnson v. Bean (Minn., 1904), 99 N. W. 893.

[19] Cardinal v. Hadley, 158 Mass.

ant was allowed to show, on the question of damages, that the plaintiff only bought the surface of the coal lands conveyed, the court holding that such evidence went only to the consideration and not to the substance of the deed.[20]

Notwithstanding the acknowledgment in a deed of the receipt of the purchase-money, it may be shown by parol that it was not in fact paid,[21] or that it was paid by money or property, as it is nothing more than a receipt, and is open to explanation.[22] Its only effect is to estop the grantor from setting up a want of consideration, and for every other purpose it is open to explanation, and may be varied by parol proof.[23] Where the payment of the consideration is necessary to sustain the validity of the deed or the contract in question, the acknowledgment of payment is contractual in its nature, and cannot be contradicted by parol proof; but where it is to be treated merely as a receipt for money, it is only *prima facie* evidence of the payment, and the fact that there was no payment or that the consideration was other than that expressed in the deed, may be shown by oral evidence.[24]

Sec. 27. Mistake.

Courts of equity will also sometimes admit parol evidence to contradict or vary a writing, where by some *mistake in fact,* it speaks a different language from what the parties intended, and

352, 33 N. E. 575, 35 Am. St. Rep. 492.

[20] Lloyd v. Sandusky, 203 Ill. 621, 68 N. E. R. 154, 159.

[21] Fowlkes v. Lea, 84 Miss. 509, 36 So. 1036.

[22] Elder v. Hood, 38 Ill. 533; Vaugine v. Taylor, 18 Ark. 65; Coles v. Soulsby, 21 Cal. 47; Millard v. Hathaway, 27 id. 119; Callayway v. Hearn, 1 Houst. (Del.) 607; Bratt v. Bratt, 21 Md. 578; Harris v. Harris, 2 Harr. (Del.) 354; Ayers v. McConnel, 15 Ill. 230; Kimball v. Walker, 30 Ill. 482; Halt v. Perry, 3 Iowa, 579; Barbank v. Gould, 15 Me. 118; Bassett v. Bassett, 55 Me. 127; Elysville Co. v. O'Kisko Co., 1 Md. Ch. 392; Spalding v. Brent, 3 id. 411; Lirgun v. Henderson, 1 Bland (Md.), 236; Davenport v. Mason, 15 Mass. 86; Wilkinson v. Scott, 17 id. 249; Clapp v. Linell, 20 Pick. (Mass.) 247; Speer v. Speer, 14 N. J. Eq. 240; Herbert v. Scofield, 9 N. J. Eq. 492; Shepard v. Little, 14 Johns. (N. Y.) 210; Whitbeck v. Whitbeck, 9 Cow. (N. Y.) 266; Baker v. Connell, 1 Daly (N. Y.), 469; Wesson v. Stevens, 2 Ired. (N. C.) Eq. 557; Deloach v. Turner, 6 Rich. (S. C.) 117; Gibson v. Fifer, 21 Tex. 260; White v. Miller, 22 Vt. 380.

[23] Stackpole v. Robbins, 47 Barb. (N. Y.) 212.

[24] Deaver v. Deaver (N. C., 1904), 49 S. E. 113. Holding that the recital of payment of the consideration in a certain deed of trust might be denied by parol.

where, consequently, it would be unconscientious or unjust to enforce it against either party according to its expressed terms.[1] In

[1] Hunt v. Rousmanier, 8 Wheat. (U. S.) 211; Peterson v. Grover, 20 Me. 363; Anderson v. Bacon, 1 A. K. Mar. (Ky.) 48; Huston v. Stoble, 4 J. J. Mar. (Ky.) 130; Blanchard v. Moore, 4 id. 471; Gibson v. Watt. 1 McCord Ch. (S. C.) 490; Perry v. Pearson, 1 Humph. (Tenn.) 431; Van Ness v. Washington, 4 Pet. (U. S.) 232; Harrison v. Howard, 1 Ired. (N. C.) Eq. 407; Evans v. Hooper, 3 N. J. Eq. 204; Mageehan v. Adams, 2 Binn. (Penn.) 109. A mere clerical error may be shown in a court of law, as an error in the date. Leggitt v. Buckhalter, 30 Miss. 421.

In respect to mistakes of law, as contradistinguished from mistakes of fact, see Wheaton v. Wheaton, 9 Conn. 96; Lowndes v. Chisholm, 2 McCord (S. C.) Ch. 455; Hopkins' Ex'rs v. Mazyck, 1 Hill Ch. (S. C.) 251; Fitzgerald v. Peck, 4 Litt. R. 125; Champlin v. Laytin, 1 Edw. Ch. (N. Y.) 467; Hunt v. Rousmanier, 1 Pet. (U. S.) 15; 8 Wheat. (U. S.) 174; 3 Mas. (U. S.) 294; Sims v. Lyle, 4 Wash. C. C. R. 301, 320; Heilner v. Imbrie, 6 S. & R. (Penn.) 411; Lyon v. Richmond, 2 John. Ch. (N. Y.) 51; Williams v. Hodgson, 2 H. & J. (Md.) 474; Lammat v. Browby, 6 id. 24; Rawstone v. Parr, 3 Russ. 424; Clark v. Dutcher, 9 Cow. (N. Y.) 674; Lawrence v. Beaubin, 2 Bail. (S. C.) 623; Moser v. Liebenguth, 2 Rawle (Penn.), 428; Haven v. Foster, 9 Pick. (Mass.) 112; Shotwell v. Murray, 1 John. Ch. (N. Y.) 512; Storrs v. Barker, 6 John. Ch. (N. Y.) 166; Naylor v. Wench, 1 Sim. & Stud. 561; Jones v. Watkins, 1 Stew. 81; Ward v. Tucker, 7 Mass. 449; Hubbard v. Martin, 8 Yerg. (Tenn.) 498; Dickens v. Jones, 6 id. 483; Besore v. Potter, 12 S. & R. (Penn.) 158; Robinson v. Wiley, 15 N. Y. 489.

As to showing fraud, surprise and mistake, in answer to a bill for a specific performance of an agreement, see 2 Story's Eq. 24 *et seq.;* Ratcliffe v. Allison, 3 Rand. (Va.) 537; Bradbury v. White, 4 Me. 391; Young v. Craig, 2 Bibb (Ky.), 270; Fisher v. May, 2 id. 451; Smith v. Smith, 4 id. 81; Harrison v. Talbot, 2 Dana (Ky.), 258; Gower v. Sterner, 2 Whart. (Penn.) 75, 79; Moliere v. The Pennsylvania Ins. Co., 5 Rawle (Penn.), 342; Wheatley v. Slade, 4 Sim. 126; Cathcart v. Robinson, 5 Pet. (U. S.) 264; Watts v. Waddle, 6 id. 389; Hutchinson v. McNutt, 1 Hamm. (Ohio) 14; Askey v. Poyas, 2 Dess. (S. C.) Eq. 145; Meads v. Lansing, 1 Hopk. Ch. (N. Y.) 124; Faure v. Martin, 7 N. Y. 210; Schmidt v. Livingston, 3 Edw. Ch. (N. Y.) 213; Best v. Stow, 2 Sand. Ch. (N. Y.) 298.

As to the admissibility of parol evidence, in courts of equity, for the purpose of obtaining relief against fraud, and what constitutes that species of fraud upon which those courts will interfere, see 1 Story Eq. 166-168; also id. 194 *et seq.;* Gresl. Eq. Ev. 206, 207; Wilkinson v. Wilkinson, 2 Dev. (N. C.) Eq. 378; Flagler v. Pleiss, 3 Rawle (Penn.), 345; Rice v. Spotswood, 6 Mon. (Ky.) 40; Boyce v. Grundy, 3 Pet. (U. S.) 210; Stinson v. McKeown, 1 Hill (N. Y.) 387.

It is clear that a party may, as plaintiff, have relief against a written contract, by having the same set aside and canceled or modified, whenever it is founded in mistake of material facts, and it would be unconscientious and unjust for the other party to enforce it. See Ball v. Storie, 1 Sim. & Stud. 210. And this, although the party seeking the relief drew the instrument himself. Id.; Gibson v. Watts, 1 McCord Ch. (S. C.) 494, 495. See, furthers, as to the general doctrine, Chase v. Manhardt, 1 Bland Ch. (Md.) 333; 1 Story Eq. 164; Fishback v. Woodford, 1 J. J. Mar. (Ky.) 84; Bierne v. Erskine, 5 Leigh (Va.), 59; McMahon v. Spangler, 4 Rand. (Va.) 51; Anderson's Ex'r v. Bacon, 1 Marsh. (Ind.) 48; Love v. Cofer, 1 J. J. Mar. (Ky.) 327; Bodley v. McChord, 4 J. J. Mar. (Ky.) 475; Huston v. Noble, 4 J. J. Mar. (Ky.) 130; Rice's Heirs v. Spotswood's Heirs, 6 Mon. (Ky.) 40; Inskoe v. Proctor, 6 Mon. (Ky.) 312; Allen v. Hammond, 11 Pet. (U. S.) 63.

But, in England, it is not admis-

all cases, however, of this kind, the party seeking relief undertakes a task of great difficulty, since a court of equity will not in-

sible for a plaintiff to allege a mistake, with a view of correcting the contract, and, at the same time, seek a specific performance of it in its rectified state. See Gresl. Eq. Ev. 206, 207. Most of the English cases on this subject will be found collected in the notes to 1 Story Eq. 174. The learned author remarks in respect to this doctrine, that "it is certainly of a very artificial character, and difficult to be reconciled with the general principles of courts of equity." It is, "in effect," he says, "a declaration, that parol evidence shall be admissible to correct a writing as *against* a plaintiff, but not in *favor* of the plaintiff, seeking a specific performance. There is, therefore, no mutuality or equality in the operation of the doctrine. The ground is very clear, that a court of equity ought not to enforce a contract, where there is a mistake, against the defendant, insisting upon, and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground why equity should interfere at the instance of the party, as plaintiff, and cancel it; and if the mistake is partial only, why at his instance it should reform it. In these cases the remedial justice is equal; and the parol evidence to establish it is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement, have relief in all cases, where he is plaintiff, as well as where he is defendant? Why should not parol evidence be equally admissible to establish a mistake as the foundation of relief in each case? The rules of evidence ought certainly to work equally for the benefit of each party. Mr. Chancellor KENT has forcibly observed, 'that it cannot make any difference in the reasonableness and justice of the remedy whether the mistake was to the prejudice of one party or the other. If the court has a competent jurisdiction to correct such mistakes (and that is a point understood and settled), the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement, perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties. *Res accedent lumina rebus.*' It may be added, that, if the doctrine be founded upon the impropriety of admitting parol evdence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff, than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the Statute of Frauds, if not more intelligible, it would at least have been less inconvenient in practice. But it does not appear to have been thus restricted, although the cases in which it has been principally relied on have been of that description. It will often be quite as unconscientious for a defendant to shelter himself under a defense of this sort, against a plaintiff seeking the specific performance of a contract, and the correction of a mistake, as it will be to enforce a contract against a defendant, which embodies a mistake to his prejudice. See Comyn's Digest, Chancery, 2 C. 4; 2 X. 3; 4 L. 2." 1 Story Eq. 175, note 1.

The doctrine of Woollam v. Hearn, 7 Ves. 511, and other English cases proceeding on like views, holding, that while parol evidence may be received *against* a plaintiff seeking specific performance, it will not be received in his favor to rectify a written agreement, has been distinctly repudiated in New York, and seems indeed not ot have been sanctioned by any of the courts of equity in this country. See Keisselbrack v. Livingston, 4 John. Ch. (N. Y.) 144 Gillespie v. Moon, 2 id. 585; also, The Hiram, 1 Wheat. (U. S.) 444; Hunt v. Rousmanier, 8 Wheat. (U. S.) 211; Hogan v. Delaware Ins. Co., 1 Wash. (U. S. C. C.) 422; Rosevelt v. Fulton, 2 Cow. (N. Y.) 129; Patti-

terfere, unless it is clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next,

son v. Hull, id. 747; Wesley v. Thomas, 6 H. & J. (Md.) 24; Newsom v. Bufferlou, 1 Dev. Eq. 379; Gower v. Sterner, 2 Whart. (Penn.) 75, 79; Abbe v. Goodwin, 7 Conn. 377. But see Westbrook v. Harbeson, 2 McCord Ch. (S. C.) 112; Elder v. Elder, 10 Me. 80; Dwight v. Pomroy, 17 Mass. 303; Bradbury v. White, 4 Me. 391; Harrison v. Talbot, 2 Dana (Ky.), 250.

As to the admissibility of parol evidence, and what shall constitute part performance, see 1 Story Eq. 21 *et seq.* See, also, German v. Machin, 6 Paige (N. Y.), 288; Wetmore v. White, 2 Cain Cas. in Er. 87; Hall v. Hall, 2 McCord Ch. (S. C.) 269; Miller v. Hower, 2 Rawle (Penn.), 53; Low v. Treadwell, 13 Me. 441; Brooks v. Wheelock, 11 Pick. (Mass.) 439; Monahan v. Colgin, 4 Watts (Penn.), 436; Ellis v. Ellis, 1 Dev. (N. C.) Eq. 341.

See, on the subject of bills to reform agreements, 1 Story Eq. 164 *et seq.;* McMahon v. Spangler, 4 Rand. (Va.) 51; Cook v. Preston, 2 Root, 78; Elmore v. Austin, 2 Root (Conn.), 415; Parsons v. Hosmer, 2 Root (Conn.), 1; Sanford v. Washburne, id. 499; Chadman v. Allen, Kirby (Conn.), 399; Lemaster v. Buckhart, 2 Bibb (Ky.), 29; Colyer v. McGee, id. 321; McCurdy v. Breathitt, 5 Mon. (Ky.) 534; Love v. Cofer, 1 J. J. Mar. (Ky.) 327; Moser v. Libenguth, 2 Rawle Penn.), 428; Insko v. Proctor, 6 Mon. (Ky.) 316; Parcels v. Gohegan, 2 J. J. Mar. (Ky.) 133; Hunt v. Rousmaniere, 1 Pet. (U. S.) 1; 8 Wheat. (U. S.) 174; Burdett v. Simms, 3 J. J. Mar. (Ky.) 190; Harrison v. Jameson, id. 232; Hunt v. Freeman, 1 Hamm. (Ohio) 501; Phoenix Ins. Co. v. Gurnee, 1 Paige (N. Y.), 278; Rosevelt v. Fulton, 2 Cow. (N. Y.) 129; Chamberlain v. Thompson, 10 Conn. 243; Gillespie v. Moon, 2 John. Ch. (N. Y.) 585; Wheaton v. Wheaton, 9 Conn. 96; Young v. Craig, 2 Bibb (N.Y.), 270; Smith v. Smith, 4 id. 81; Newsom v. Bufferlou, 1 Dev. Eq. (N. C.) 379; Gower v. Sterner, 2 Whart. (Penn.) 75; Dalzell v. Timrod, 1 Dess. Eq. (S. C.) 339; Holmes v. Simmons, 3 Dess. Eq. (S. C.) 149. See, also, the cases *post* in these notes, relative to wills.

In an action brought to reform a written instrument, *e. g.* a bond, the consideration of which proceeds from a third party acting for the obligee, the latter is entitled to a decree reforming the instrument on showing, *first,* a plain mistake, clearly made out by satisfactory proofs; and, *second,* that the part omitted or inserted was so omitted or inserted contrary to the intent of both parties, and under a mutual mistake. Nevins v. Dunlop, 33 N. Y. 676. Mr. Justice BROWN, in delivering the opinion of the court, adopts the language of Chief Justice SPENCER, in Lyman v. The Utica Ins. Co., 17 John. (N. Y.) 373: "It is not enough, in cases of this kind, to show the sense and intention of one of the parties to the contract. It must be shown incontrovertibly that the sense and intention of the other party concurred in it; in other words, it must be proved that they both understood the contract as it is alleged it ought to have been, and in fact it was, but for the mistake. It would be the height of injustice to alter a contract on the ground of mistake, when the mistake arises from misconception of one of the parties in consequence of his imperfect explanation of his intentions. If it be clearly shown that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail unless it be further shown that the other party agreed to it in the same way, and that the intention of both of them was by mistake misrepresented by the written contract."

See, also, 1 Story Eq. 160; also Elder v. Elder, 10 Me. 80; Hodgson v. Hancock, 1 Y. & Jer. 317; United States v. Monroe, 5 Mas. (U. S.) 571; Phoenix Ins. Co. v. Gurnee, 1 Paige (N. Y.), 278; Watkins v. Stockett, 6 H. & J. (Md.) 435; Graves v. The Boston Marine Ins. Co., 2 Cranch (U. S.) 419; Dupree v. McDonald, 4 Dess. Eq. (S. C.) 209;

that it is such a mistake as ought to be corrected.[2] A *plaintiff* may seek the relief in equity by filing a bill either to *reform* the writing, in which event it will be necessary to satisfy the court that there was a mistake on *both sides*,[3] or to *rescind* the instrument, in which case, though conclusive proof of error or surprise on the plaintiff's part alone will suffice,[4] it must appear that the mistake was one of vital importance.[5] In either of these cases, if the defendant by his answer denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce,—such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like,—the plaintiff's position will be well nigh desperate, though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the court in granting the relief prayed.[6] A *defendant*, also, against whom a specific performance of a written agreement is sought, may insist by way of answer upon the mistake, and may establish its existence by parol evidence, because he may rely on any matter which shows it to be inequitable to enforce the contract.[7]

Lyman v. The United Ins. Co., 2 John. Ch. (N. Y.) 630; Gillespie v. Moon, id. 585; Harris v. Dinkins, 4 Dess. Eq. (S. C.) 60; Abbie v. Goodwin, 7 Conn. 377.

[2] M. of Townsend v. Strangroom, 6 Ves. 339; Mortimer v. Shortall, 2 Dru. & W. 371; Gillespie v. Moon, 2 John. Ch. (N. Y.) 585.

[3] The mistake of one party alone to a deed as to its contents is not ground for reforming it in equity. The mistake must be mutual. Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301; Somerville v. Coppage (Md., 1905), 61 A. 318.

[4] Mortimer v. Shortall, 2 Dru. & W. 372.

[5] 1 Story Eq. Jur. § 144, *n*. A lease of water rights may be shown never to have any existence by evidence that it was entered into under a mutual mistake to the effect that the water could be used in manufacturing. Bedell v. Wilder, 65 Vt. 406, 26 A. 589, 36 Am. St. Rep. 871. Where the agent for an insurance company was shown the property to be insured and wrote the description of it in the application which the insured signed, the latter may show in an action on the policy that the description in the policy was a misdescription and may show that the property intended to be insured was that originally pointed out to the defendant. Alabama Mutual Fire Insurance Co. v. Minchener, 133 Ala. 632, 32 So. 225. In a suit in equity to reform a deed evidence may be admitted of the treasurer of the grantor corporation as to the intention of the parties in making the deed to show that an obvious mistake had occurred. Southern Finishing & Warehouse Co. v. Ozment, 132 N. C. 839, 44 S. E. 681. In a bill in equity to confirm a tax title evidence will not be received to show that the taxes for a year different from that named in the tax deed were really sold. Bower v. Chess & Wymand Co., 82 Miss. 218, 35 So. 444.

[6] Mortimer v. Shortall, 2 Dru. & W. 374; Alexander v. Crosbie, R. temp. Sugden, 150; M. of Townsend v. Strangroom, 6 Ves. 339; Gillespie v. Moon, 2 John. Ch. (N. Y.) 600.

[7] Davies v. Fitton, 2 Dr. & W. 232; M. of Townsend v. Strangroom, 6

Sec. 28. Waiver, Alteration, or Discharge of Contract.

It is always competent for a party to a written contract to show that it was *subsequently* to the execution of a written contract, abandoned by the parties thereto, either in whole or in part, or that some of its provisions were waived,[1] and this applies as well to contracts under seal as to simple contracts,[2] and it has been held that even the waiver of a condition of a deed may be shown by parol.[3] As to the effect of a waiver by parol of the conditions of an instrument under seal, and the substitution of new parol conditions, it may be said that, if the entire contract under seal is not abandoned, the whole, by such a change, is reduced to the character of a simple contract, so that assumpsit, instead of debt or covenant, is the proper remedy thereon.[4] The time for the performance of a contract, whether under seal or not, may be enlarged by parol,[5] and the time for the performance of the condition of a bond may also be so enlarged.[6] The parties to a contract for the purchase of

Ves. 328. Parol evidence is admissible to show that an agreement to convey land in escrow was given under a mutual mistake. Beach v. Bellwood (Va., 1905), 51 S. E. 184.

[1] Harris v. Murphy, 119 N. C. 34, 25 S. E. 708, 56 Am. St. Rep. 656, and note page 659; Putnam Foundry & Machine Co. v. Canfield, 25 R. I. 548, 56 A. 1033; Raffensberger v. Collinson, 28 Penn. St. 426; Willey v. Hall, 8 Iowa, 62; Chiles v. Jones, 3 B. Mon. (Ky.) 51; Bryan v. Hunt, 4 Sneed (Tenn.), 543; Wood v. Perry, 1 Barb. (N. Y.) 114.

[2] Flinn v. McKean, 6 Duer (N. Y.), 203; Leathe v. Bullard, 8 Gray (Mass.), 545; Lefevre v. Lefevre, 4 S. & R. (Penn.) 241; Cringum v. Nicholson, 1 H. & M. (Va.) 435.

[3] Leathe v. Bullard, *ante*. In Whitcher v. Shattuck, 3 Allen (Mass.), 318, it was held that under a chattel mortgage, reserving to the mortgagor possession and control of the goods until after default, it may be shown by parol that the mortgagor waived this right.

[4] Hydeville Co. v. Eagle R. R. & Slate Co., 44 Vt. 395.

Thus, in a Massachusetts case, Munroe v. Perkins, 9 Pick. (Mass.), 298, an action of assumpsit was brought for work and labor, etc., and the defendant set up in defense that the whole took place under a special contract under seal, which was produced. The plaintiff showed that being unable to go on after having partly performed his contract, without material loss, he refused to proceed, but that the defendant, by parol, thereupon promised him that if he would go on he should be paid for the labor, etc., and should not suffer, and upon the faith of such parol promise he went on and performed the labor, etc., for which he sought to recover. See, also, to the same effect, Lattemore v. Hurson, 14 John. (N. Y.) 330; Allen v. Jaquish, 12 Wend. (N. Y.) 628.

[5] Friess v. Rider, 24 N. Y. 367.

[6] Stone v. Sprague, 20 Barb. (N. Y.) 5, 9; Esmond v. Van Benschoten, 2 id. 366; Neil v. Tilman, 1 Bailey (S. C.), 538 *n*.

Thus, in a New York case, Fleming v. Gilbert, 3 John. N. Y. 328, an action was brought upon a bond conditioned that the defendant, by a given day, should procure and deliver to the plaintiff a certain bond and mortgage, and discharge the same of record. The defendant did procure the bond and mortgage, and offered

real estate may wave its terms by parol and annul or extinguish its provisions, without writing.[7] So if a contract provides for delivering in fifty pound boxes, a subsequent agreement to deliver in lots of one hundred fifty pound boxes each may be proved.[8] Where a contract provides for payment in these words, "sight draft, with bill of lading attached," it is competent to prove a subsequent oral agreement as to whom the draft should be drawn upon and where it should be presented.[9] But where an express company on receipt of goods gives a shipping receipt expressing that the company is not to be responsible for the negligence of connecting carriers the

them to the plaintiff, proposing to do whatever else he required to discharge the mortgage of record; but the plaintiff, not knowing what was necessary, agreed by parol to waive a literal performance in this respect, if the defendant would do another thing, which he afterwards did; held, that evidence of the parol waiver, etc., was admissible, and amounted to a defense. The court went upon the ground, that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Where the condition of a bond was to raise a mill, the obligor came to the obligee and told him everything was ready to erect the mill, and asked him when he would have him come and put it up; the obligee answered, that he would not have it, and discharged him entirely of erecting the mill, and that was held sufficient to excuse him from the performance. Fleming v. Gilbert, *supra*, *per* Thompson, J., citing 1 Roll Abr. 453, pl. 5, Year-Book, 2 Hen. VI, 37. In an English case, Radcliffe v. Pemberton, 1 Esq. 35, Lord Kenyon held, that to an action of covenant on a charter party, for the demurrage which was stipulated in it, the defendant might plead that the covenantee, who was the master and owner of the ship, verbally permitted the delay, and agreed not to exact any demurrage, but waived all claim to it. Thresh v. Rake, id. 53. So where the plaintiff sued on a breach of covenant, for not giving a deed, it was held a good plea, and the defendant would have given a deed at the time stipulated, but the plaintiff objected, and said when he wished the deed he would apply for it. Baker v. Whiteside, 1 Breese (Ill.), 132.

In a New York case, Dearborn v. Cross, 7 Cow. (N. Y.) 48, the action was on notes, payable in specific articles. It appeared that the consideration of the notes was a bond of the plaintiff, by which the latter obligated himself to convey certain premises to the former: that, by a subsequent parol agreement, the parties had stipulated to rescind the contract of sale; and that the plaintiff, pursuant to this arrangement, had re-entered upon the premises, and finally sold them to another individual. The court held, that though the bond was not canceled or given up, or any of the papers changed, yet by the parol agreement, and the acts of the parties under it, the bond was discharged, and, therefore, no action would lie on the notes. In a later case, Barnard v. Darling, 11 Wend. (N. Y.) 22, the defendants being sued on a bond given by them as sureties of a deputy sheriff, set up by way of plea, a parol agreement of the sheriff that *he would release them*. No consideration was alleged for the agreement, and this the court, on demurrer, adjudged fatal to the plea. They, however, intimated an opinion, that a parol agreement, executory in its character, could not discharge a covenant.

[7] Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856, 859.

[8] Town v. Jepson, 133 Mich. 673, 95 N. W. 742.

[9] Town v. Jepson, 133 Mich. 673, 95 N. W. 742.

receipt constitutes the contract and cannot be varied by parol evidence of a subsequent agreement to deliver the goods within a certain time when the delay results from the negligence of a connecting carrier.[10] Parol evidence is admissible to show that a contract has been satisfied and complied with prior to its execution.[11]

Sec. 29. To show Warranty.

The rule is, that where a contract for the sale of property has been reduced to writing, *and is evidently complete in itself,* it is not competent for the parties to engraft new terms or conditions thereon in the form of a warranty;[1] but where the contract as expressed in the writing is manifestly incomplete, parol evidence is admissible to show a contemporaneous agreement that the property should be of a certain quality, kind or quantity.[2] When the

[10] Sloman v. National Express Co., 134 Mich. 16, 95 N. W. 999.

[11] A certain memorandum for the sale of "good merchantable hay" was held to be subject to evidence that it referred to certain specific hay already examined and accepted by the buyer. Henry v. Herschey (Idaho, 1904), 75 Pac. 266.

[1] Mast v. Pearce, 58 Iowa, 579; Jolliff v. Collins, 20 Mo. 338; Lamb v. Crafts, 12 Met. (Mass.) 353; Reed v. Wood, 9 Vt. 285; Shepherd v. Gilroy, 46 Iowa, 193; Mumford v. McPherson, 1 John. (N. Y.) 414; Van Ostrand v. Reed, 1 Wend. (N. Y.) 424; McMullain v. Thomas, 43 Conn. 252; Rice v. Forsythe, 41 Md. 389; Dean v. Mason, 4 Conn. 428; Salem, &c., Co. v. Adams, 23 Pick. (Mass.) 256; Boardman v. Spooner, 13 Allen (Mass.), 361; Kain v. Old, 2 B. & C. 627; Spooks v. Messick, 65 N. C. 440; The Johnston Co. v. Bartley, 81 Ind. 406; Lamb v. Crafts, 12 Met. (Mass.) 353; Battens v. Sellers, 5 H. & J. (Md.) 117; Froreich v. Gammon, 28 Minn. 476; Wilson v. Marsh, 1 John. (N. Y.) 503; Whitmore v. So. Boston Iron Co., 2 Allen (Mass.), 58; Reed v. Wood, 9 Vt. 285; Keller v. Webb, 126 Mass. 393; Frost v. Blanchard, 97 Mass. 155; Etheridge v. Pulin, 72 N. C. 213; Naumberg v. Young, 35 N. J. L. 331.

[2] Chapin v. Dobson, 78 N. Y. 74; Scott v. Sweet, 2 G. Green (Iowa), 224.

The rule as stated was held in the New York case cited, *ante*, under the following facts: The parties entered into a parol agreement that the plaintiff should furnish the defendant with certain machinery at a specified price, and that the defendant should accept and pay for the same in a specified manner, and that the plaintiff should guarantee that the machines should do the defendant's work satisfactorily. The agreement was reduced to writing and signed, not including the guaranty, and it was held that parol evidence was admissible to add the guaranty. The court placed its decision expressly upon the ground that the agreement relating to the guaranty was collateral, and that the writing was manifestly, as it was in fact found to be, incomplete. The court predicated its doctrine upon an early English case, Jeffrey v. Walton, 1 Stark. 385, and an early case in New York, Battemore v. Pierce, 3 Hill (N. Y.), 171, and so far as the doctrine of the two cases referred to is concerned, there can be no question as to their accuracy, as in neither case did the writing purport to embrace the entire contract. But in the principal case, Dobson v. Chapin, *ante, the writing*

writings show a complete legal obligation without any uncertainty as to its object and extent it is conclusively presumed that the whole agreement of the parties was included in the writings. So evidence of the preliminary negotiations is not admissible to add

was evidently complete and was signed by both parties. There was nothing upon the face of the contract from which a presumption that it was incomplete could be drawn. It is true that the referee found as a fact that it was incomplete, but if this circumstance is to furnish a ground for the admission of such evidence, then it opens the way for its admission in every case *where the jury find that such an agreement was in fact made, and it does not conflict with or antagonize any of the stipulations in the written contract.* The court says: "The written contract and the guaranty do not relate to the same subject-matter. The contract is limited to a particular machine, as such, the guaranty is limited to the capacity of the machine." But the court seems to have lost sight of the fact that *both* were a part of an *entire contract*, and that there was no pretense *that two separate and distinct contracts relating to the matter were entered into*, nor was there any pretense that the omission of the guaranty from the writing *was brought about by the fraud of the plaintiffs*, but that the omission, if not intended by the parties, was the result of accident or a mistake, and it seems to us that the only remedy open to the defendant was to seek a reformation of the contract upon that ground, and that the doctrine held by the court is contrary to the general drift of authority, and carried to its legitimate sequence would result in a disastrous relaxation of a highly salutary rule of evidence. There is a class of cases where evidence of a parol agreement, contemporaneous with the written agreement, is admissible *when the parol agreement was an inducement to the execution of the written agreement.* Pierce v. Woodward, 6 Pick. (Mass.) 206; Shugart v. Moore, 78 Penn. St. 469; Pamelton Coal Co. v. McShain, 75 id. 238. But this case does not seem to come within the rule of these cases, or have any of the essential features requisite to bring it within the exception upon this ground. In an English case, Kain v. Old, 6 B. & C. 627, the rule which is universally acted upon, that when the contract is finally consummated, all prior conversations and negotiations are merged therein, was recognized. In that case, the bill of sale in the usual form contained no warranty that the vessel sold was copper-fastened. There had been a previous written representation by the vendor that she was copper-fastened. The court held that this prior representation formed no part of the contract and was not a warranty. "Where," said ABBOTT, C. J., "the whole matter passes in parcel, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain *may be excluded by the language used at its termination.. But if a contract be in the end reduced to writing, nothing which is not found in writing can be considered as a part of the contract.* A matter antecedent to and *dehors* the writing may in some cases be received in evidence, *as showing the inducement to the contract*, such as a representation of some particular quality or incident to the thing sold; *but the buyer is not at liberty to show that the seller, by some fraud, prevented him from discovering a fault which he, the seller, knew to exist.*"

"The only safe criterion," says DEPUE, J., in Naumberg v. Young, 35 N. J. L. 331, in a very able and exhaustive opinion, "of the completeness of a written contract as a full expression of the terms of a party's agreement, is the contract itself. When the parties have deliberately put their engagements into writing in such language as imports a legal ob-

a warranty to a contract of purchase,[3] or any unambiguous contract.[4] So where a contract is evidenced by a written order containing no reference to a warranty a warranty cannot be added by implication of law or parol proof.[5] Parol evidence is inadmissible to add to a contract for a refrigerator a contemporaneous parol warranty as to its capacity,[6] or to show that the assignor of a mortgage verbally warranted the mortgage to be a good lien on the property in the absence of fraud or deceit.[7] But where the contract is evidently incomplete, being merely an informal bill or receipt and not intended to embrace the entire contract, parol evidence of a warranty of the goods is admissible.[8] Thus where

ligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance; and consequently all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after the time of the completion of the contract, will be rejected." Crane v. Elizabeth, &c., Ass'n, 29 N. J. L. 305; Powell v. Edmunds, 12 East, 6; Dutton v. Gerrish, 9 Cush. (Mass.) 89; Sheckles v. Sax, 1 E. D. S. (N. Y. C. P.) 253; Hei v. Heller, 53 Wis. 415. In the Massachusetts case, Dutton v. Gerrish *ante*, it was attempted to engraft upon a lease a parol warranty by the landlord that the premises were fit for the purpose for which they were let; but the evidence was rejected, SHAW, C. J., saying: "If there was any warranty, express or implied, it was a part of the contract of hiring and not something separate and independent, and must therefore be found in one of the items or terms of that contract." So where a lease is silent as to repairs, it cannot be shown by parol that the landlord agreed to make the repairs. 3 Starkie Ev. 1007. See opinion of GHALSON, J., in Howard v. Thomas, 12 Ohio St. 201. In a New York case, Wilson v. Deen, 74 N.Y. 531, there was a lease of a house and furniture, and a schedule of the furniture was annexed to the lease. In an action to cancel the lease, oral testimony to show that the lessor agreed that certain deficiencies in the furniture should be made up, was rejected. Emery v. Perry, 17 L. T. U. S. 152. In an Iowa case, Mast v. Pearce, 58 Iowa, 579; 43 Am. Rep. 125, the doctrine of the New York case, Chapin v. Dobson, 78 N. Y. 34, 34 Am. Rep. 512, was expressly repudiated as being unsound and against authority.

[3] Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218, 70 N. E. R. 319; De Witt v. Berry, 134 U. S. 306, 10 S. C. 536.

[4] Neale v. American Electric Vehicle Co., 186 Mass. 303, 71 N. E. 566.

[5] Rollins Engine Co. v. Eastern Forge Co. (N. H., 1904), 59 A. 382.

[6] McCray R. & C. S. Co. v. Woods, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599.

[7] Nally v. Long, 71 Md. 585, 18 A. 811, 17 Am. St. Rep. 547.

[8] Henson v. Henderson, 21 N. H. 224; Perrins v. Cooley, 39 N. J. L. 449; Hazard v. Loving, 19 Cush. (Mass.) 267; Henshaw v. Robbins, 3 Met. (Mass.) 136; Bradford v. Manly, 13 Mass. 139; Williams v. Shafford, 8 Pick. (Mass.) 250; Schenck v. Saunders, 13 Gray (Mass.), 37; Wallace v. Rogers, 2 N. H. 506; Bushtel v. The Mason Lumber Co., 1 Flip. (U. S. C. C.) 640; Foot v. Bentley, 44 N. Y. 166; Hildreth v. O'Brien, 10 Allen (Mass.), 144; Frost v. Blanchard, 10 id. 155; Fletcher v. Willard, 14 Pick. (Mass.) 464; Stacy v. Kemp, 97 Mass. 168; Atwater v. Clancy, 107 id. 369.

a contract is contained in a letter ordering a certain engine specified for a certain price and there is no formal contract a warranty can be proved by parol.[9] Also where at the time a machine is ordered to be constructed a memorandum of the order is signed by the prospective buyer it is held that an oral warranty of the capacity of the machine made at the time of the signing of the order may be proved by parol as the note appears to be incomplete and does not purport to embrace the entire contract.[10] If a mortgagee agrees orally that in consideration of the payment to him of the purchase price of a deed by the mortgagor to the purchaser of a portion of the land covered by the mortgage that he will release the land from his mortgage and save the purchaser harmless from the lien of a certain judgment this agreement may be proved.[11]

In one case the plaintiff purchased a horse of the defendant, and received from him a memorandum of purchase in writing. The plaintiff said that when he treated for the purchase of the horse the defendant said that if he did not work well and go quietly in spare harness the plaintiff could send him back and have his money returned, and after some further talk the plaintiff bought the horse. The memorandum of sale contained no mention of the warranty. The horse proved to be vicious and unruly, and the plaintiff took him back and demanded a return of his money. The defendant insisted that the plaintiff was concluded by the writing from showing the warranty, but the evidence was admitted and the plaintiff had a verdict which was sustained, Lord ABINGER, C. B., saying: "If there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked to to ascertain the terms of the contract: but the principle does not apply here; there was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant; the contract is first concluded by parol, and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not containing the terms of the contract itself." Where a bill of parcels shows merely a sale of "cloves," parol evidence is admissible to show what kind of cloves were exhibited as a sample at the time of sale. Bradford v. Manly, 13 Mass. 139. So where the vendor, in a written agreement, agreed to ship to a person a certain quantity of "good, fine wine," it was held that parol evidence was admissible to show the actual terms of the sale and that the wine shipped was that selected by the person himself. Hogins v. Plympton, 11 Pick. (Mass.) 97. But where the goods sold are of a specified kind, parol evidence is not admissible to show that shortly before the sale the vendee inspected particular goods in the vendor's possession and that those were the goods referred to in the contract. Watsontown Car Manufactory v. Elensport Lumber Co., 99 Penn. St. 605.

[9] Puget Sound Iron & Steel Works v. Clemmons, 32 Wash. 36, 72 Pac. 465.

[10] Aultman, Miller & Co. v. Clifford, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478.

[11] Peterson v. Creason (Ore. 1905), 81 Pac. 574.

Sec. 30. To show that Writing apparently absolute, is a Security or Trust Instrument.

Parol evidence is admissible especially in a court of equity to show that a writing which, upon its face, is apparently absolute, was intended only as a security,[1] as, that a deed, apparently absolute, was only intended as a mortgage;[2] and the same rule prevails as to a conveyance of personal property,[3] or to the assignment of a mortgage.[4] An assignment of a claim absolute on its face,[5] or of a leasehold interest may be shown by parol to be for security only.[6] Certificates of stock absolute on their face may be shown to be held only as security for a debt or loan.[7] A bill of sale may be shown by parol proof to be a chattel mortage,[8] and the same is true as to any transfer of personal property.[9] So parol evidence is competent to show that the transfer of personal property by a conveyance absolute in form was in trust for the assignor.[10] Parol evidence is admissible to show that a note and mortgage on their face absolute were given merely as collateral security for a certain running account.[11] Parol evidence has, however, been held inadmissible to show that title in a sale absolute on its face was to remain in the seller until payment of the price.[12] But as to deeds, it may be said that except in those States where, by statute, courts of law are endowed with equity powers, parol evidence is not admissible in courts of law to show that a deed

[1] Fletcher v. Willard, 14 Pick. (Mass.) 464; Caswell v. Keith, 12 Gray (Mass.), 351. In those States where equity powers are conferred upon courts of law, the latter may, in an action of law, in the exercise of its equity powers, declare a deed, absolute on its face, to be a mortgage, and parol evidence is admissible to establish the fact. Stinchfield v. Millikin, 71 Me. 567; Dispande v. Walbridge, 15 N. Y. 374.

[2] Brewster v. Davis, 56 Tex. 478. Especially in equity, where these questions are usually raised. Campbell v. Dearborn, 109 Mass. 130; Hassan v. Barrett, 115 Mass. 257; Maori v. Albro, 129 Mass. 9; Budd v. Van Orden, 33 N. J. Eq. 143; Hunt v. Middleworth, 44 Mich. 448.

[3] Newton v. Fay, 10 Allen (Mass.), 505.

[4] Pond v. Eddy, 118 Mass. 113.

[5] Davis v. Crookston Water Works, etc. Co., 57 Minn. 402, 59 N. W. 482; 47 Am. St. Rep. 622.

[6] Gross v. Heckert, 120 Wis. 314, 97 N. W. 952.

[7] Burgess v. Seligman, 107 U. S. 20; Ginz v. Stumph, 73 Ind. 209.

[8] Rogers v. Nidiffer, Ind. Territory, 82 S. W. 673; Howard v. Odell, 1 Allen (Mass.), 85; Blanchard v. Fearing, 4 Allen (Mass.), 118.

[9] Hazard v. Leving, 10 Cush. (Mass.) 267; Caswell v. Keith, 12 ray (Mass.), 351.

[10] Martin v. Martin, 43 Ore. 118, 72 Pac. 639.

[11] Lippincott v. Lowrie, 119 Wis. 573, 97 N. W. 179.

[12] Feld v. Stewart, 78 Miss. 187, 28 So. 819; Finnigan v. Shaw, 184 Mass., 112, 68 N. E. R. 35, where sale note set out absolute contract.

absolute on its face was intended as a trust or as a mortage. In reference to the admission of such evidence in equity for the purpose of changing a conveyance apparently absolute into a mortgage, it is clear that it can only be done upon some ground which will authorize an inquiry as to the real intention, independent of the one expressed in the writing. But how far can this inquiry go? Is it limited to the ascertainment of what the instrument would have expressed, had it not been for some mistake of the scrivener, some fraud of the opposite party, or some other intervening circumstance, constituting in itself a sufficient ground of relief in respect to written instruments generally in that court?—or may the court conform the instrument to an intent not only unexpressed, but which the parties, trusting at the time to each other, did not mean it should express? Upon these and various other points, the cases are by no means uniform.[13]

It may be well to say that the Pennsylvania cases, and cases arising in other States where courts at law possess equity powers, on the subject of oral evidence, in respect to written instruments, are not safe guides when the inquiry is simply as to the rule *at law*. In the main, they agree in their results with the decisions in equity; but, to one accustomed to see the distinction between

[13] As to the general doctrine, see 2 Story's Eq. 287; 4 Kent's Comm. 142. See as to the rule in England, Maxwell v. Montacute, 1 Prec. in Ch. 526; Walker v. Walker, 2 Atk. 99; Joynes v. Statham, 3 id. 389; Vernon v. Bethel, 2 Eden, 113; Harris v. Horwell, Gilb. Eq. Cas. 11; Dixon v. Parker, 2 Ves. Sr. 219; in the United States Court, Hughes v. Edwards, 9 Wheat. (U. S.) 489; New York, Marks v. Pell, 1 John. Ch. (N. Y.) 594; Strong v. Stewart, 4 id. 167; James v. Johnson, 6 id. 417; Clark v. Henry, 2 Cow. (N. Y.) 324; Whittick v. Kane, 1 Paige Ch. (N. Y.) 206; Slee v. Manhattan Co., id. 48; Patchin v. Pierce, 12 Wend. (N. Y.) 64; Washburn v. Merrills, 1 Day (Conn.), 139; Reading v. Weston, 8 Conn. 177; Dean v. Dean, 6 Conn. 285; Brown v. Wright, 4 Yerg. (Tenn.) 57; Ohio, Miami Exporting Co. v. The United States Bank, 1 Wright (Ohio), 249; Mercer v. Blair, Litt. Sel. Cas. (Ky.) 412; Thompson v. Patton, 5 Litt. 74; Lewis v. Robards, 3 Monroe, 409; Murphy v. Trigg, 1 id. 72; Lindley v. Sharp, 7 id. 252; Irby v. Little, 4 Dess. Eq. (S. C.) 422; Todd v. Rivers' Ex'rs, 1 id. 155; Lloyd v. Ingliss, id. 333; Fitzpatrick v. Smith, id. 345; Hatter v. Etenaud, 2 id. 570; and see Stinson v. McKeown, 1 Hill (S. C.) 387; Ross v. Norvell, 1 Wash. (Va.) 14; King v. Newman, 2 Munf. (N. C.) 40; Robertson v. Campbell, 2 Call (Va.), 241; Streator v. Jones, 3 Hawks (N. C.), 423; 1 Murph. (N. C.) 449; Dickenson v. Dickenson, 2 id. 279; Jackson v. Blount, 2 Dev. (N. C.) Eq. 555; Anonymous, 2 Hayw. (N. C.) 26; Watkins v. Stockett, 6 H. & J. (Md.) 435; Wesley v. Thomas, id. 24: Jones v. Sluby, 5 H. & J. (Md.) 372; Hudson v. Isbell, 5 S. & P. (Ala.) 67; English v. Lane, 1 Port. (Ala.) 328; Aborn v. Bennet, 2 Blackf. (Ind.) 101; Wharf v. Howell, 5 Binn. (Penn.) 499; Thompson v. White, 1 Dall. (Penn.) 426, 427.

chancery and strict legal powers preserved in some way, they require to be read and used with more than ordinary caution, from the fact that, while the proceedings present all the external appearance of a suit at law, the judgment, in many instances, involves principles peculiar to a court of equity. Thus, judgment will sometimes be rendered for the plaintiff in the action of ejectment, when a chancellor would enforce a performance of an agreement for the land, or decree a conveyance.[14] Mistakes and frauds, in respect to written instruments, may be shown, in actions of debt, assumpsit, etc., brought upon them, and the court will relieve by acting upon them precisely as if the intent proved *aliunde* were expressed.[15] Various other peculiarities arise out of this blending of legal forms with equitable principles, which we have not the space to refer to here. It is there said that "the jurisprudence of these States now is, what the common law of England would have been, if accidental circumstances had not caused the elevation of the Court of Chancery."

The right of a creditor to show, by parol, that a conveyance, executed by his debtor, is, in reality, a mortgage, with a view of establishing that it was given to screen the property from being seized on execution, etc., has never been denied. Yet, where the intention was admitted to be *bona fide,* and no ground existed for the imputation of fraud, the fact that the conveyance was a mortgage was held immaterial, and the evidence adduced inadmissible.[16] The fact of the consideration being paid, or not, may be material, by way of establishing or rebutting fraud, as it respects

[14] Hawn v. Norris, 4 Binn. (Penn.) 78; Moody v. Van Dyke, id. 41; Peebles v. Reeding, 8 S. & R. 491.

[15] See Moser v. Libenguth, 2 Rawle (Penn.), 428; Christine v. Whitehall, 16 S. & R. (Penn.) 98; Hultz v. Wright, id. 345; Richart v. Beildeman, 17 id. 42; Jordan v. Cooper, 3 id. 546; Collom v. Hocker, 4 Rawle (Penn.), 108; Thompson v. White, 1 Dall. (Penn.) 426; Mackey v. Brownfield, 13 S. & R. (Penn.) 239; Campbell v. M'Clenachan, 6 id. 171; Christ v. Devebaugh, 1 id. 466; Cozzens v. Stephenson, 6 id. 421; Baring v. Shippen, 2 Binn. (Penn.) 154; Kelly v. Thompson, 7 Watts (Penn.), 404, 405; Besore v. Potter, 12 S. & R. (Penn.) 154, 158; Heilner v. Imbrie, 6 id. 411; Weaver v. Shyrock, id. 262; Shepherd v. Watson, 1 Watts (Penn.), 36; King v. Stubbs, 14 S. & R. (Penn.) 206; Collam v. Hocker, 1 Rawle (Penn.) 108.

[16] Stanton v. Commonwealth, 2 Dana (Ky.), 397; Reed v. Jewett, 5 Me. 96; Kelly v. Thompson, 7 Watts (Penn.), 401; New England Mar. Ins. Co. v. Chandler, 16 Mass. 275; Harrison v. Trustees of Phillips Academy, 12 Mass. 456; Jewett v. Warren, id. 300; Bartlet v. Williams, 1 Pick. (Mass.) 295; Badlam v. Tucker, id. 389; Brooks v. Powers, 15 Mass. 247; Haskell v. Greely, 3 Me. 425.

creditors; but, if it appears that there was no fraud, whether the consideration expressed was, in fact, paid, or only agreed to be paid, is immaterial.[17]

Where a deed, absolute on its face, was relied on as a circumstance to show that credit for certain repairs upon the premises was given to the grantee, it was held that the latter might show by parol that the premises were his only in trust for a third person, who received the rents and profits, and that the party making the repairs knew this before he commenced.[18]

Sec. 31. Agency or Signature in Representative Capacity.

If a contract is in writing in the name of the agent alone it is permissible by parol to show that in the making of the contract the agent was acting for the principal, even though the contract on its face contains no suggestion of agency. Such proof does not contradict the writing, it only explains the transaction.[1] Thus extrinsic evidence is admissible to show that one signing a contract as witness was really the principal.[2]

Parol evidence is also admissible to explain the nature of a signature expressed to be in a representative capacity. Thus a signature of a written instrument of guarantee "E. J. Elliott Pt." may be explained by parol evidence that Elliott signed only as president of a certain bank and did not intend to be personally liable.[3] So to show, under a guaranty to "J. H. President" that J. H. is, or was when the writing was executed, the president only of a certain bank, and the guaranty will then enure to that bank.[4] And, generally, where there is sufficient,

[17] See Sparrow v. Smith, 5 Conn. 113; Newbury v. Bulkley, 5 Day (Conn.), 384.

[18] Tripp v. Hathaway, 15 Pick. (Mass.) 47.

So in New York, where the master of a ship sued A. for his wages, and on the trial, to show that the defendant was liable, gave in evidence an absolute bill of sale of the ship to the defendant, executed by M., it was held that, as against the master, it was competent for the defendant to prove by parol that M. was the real owner, that the bill of sale was given as collateral security by way of mortgage, that the defendant had no interest in the voyage, and that these facts were known to the plaintiff, who contracted with M. originally as to his services. Champlin v. Butler, 18 John. (N. Y.) 169.

[1] Powell v. Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915, and note p. 916; Escondido Oil & Development Co. v. Glaser, 144 Cal. 494, 77 Pac. 1040.

[2] Curran v. Holland, 141 Cal. 437, 75 Pac. 46.

[3] Small v. Elliott, 12 S. D. 570, 82 N. W. 92, 76 Am. St. Rep. 630.

[4] State Bank v. Peck, 28 Vt. 200.

on the face of negotiable paper, to create a doubt to whom the credit was given, then, as between the original parties, parol evidence is admissible to remove that doubt. Thus, a signature "A. B., captain," on a bill of exchange not clearly importing a liability of the agent or of the principal, parol evidence by the plaintiff is admissible, the contract being unsealed, to show that it was intended to bind the owner, the principal, and that he had authorized the captain to bind him in that form.[5] So, too, where a bill is drawn by a corporation, addressed to its treasurer as an individual, and accepted by him with the addition of treasurer, etc., a sufficient ambiguity is thereby raised as to whether his acceptance was designed to be individual, or in his official capacity, to let in parol evidence to show the fact.[6]

Sec. 32. When an Independent Contract is entered into as an Inducement to the Execution of the Principal Contract.

Where a verbal contract or promise is made in reference to a collateral matter *as an inducement to obtain the execution of the written contract,* it may be shown by parol. Thus, in a Pennsylvania case,[1] the written agreement was "to transport at such times as you may desire, 10,000 tons of coal." The court held that parol evidence was competent to show that the plaintiff refused to sign the contract unless it was inserted that the coal should be furnished before October 1st, and that the defendant then said, "That is understood," and the plaintiff thereupon sined the contract. The court put the admission of the evidence upon the ground that the attempt of the defendant afterwards to take advantage of the omission of the promise from the contract was a fraud upon the defendant, who was induced to execute it upon such promise, and consequently that he might show the truth of the matter.[2] This rule was acted upon in another case in that State,[3] in which evidence was admitted in an action brought by a tenant against his

[5] May v. Hewitt, 33 Ala. 161.

[6] Lafflin, &c., Powder Co. v. Sinsheimer, 48 Md. 411, 30 Am. Rep. 472; Bradlee v. Boston Glass Co., 16 Pick. (Mass.) 347; Haile v. Pierce, 32 Md. 330.

[1] Powelton Coal Co. v. McShain, 75 Penn. St. 238; Campbell v. McClenachan, 6 S. & R. (Penn.) 171.

[2] Clark v. Partridge, 2 Penn. St. 13; Dutton v. Tilden, 14 id. 49.

[3] Shugart v. Moore, 78 Penn. St. 469.

landlord for a breach of contract, that he was induced to sign the lease upon an oral promise by the landlord to build a barn upon the premises before harvest time. So, in a Massachusetts case,[4] where the defendant sold the plaintiff a piece of land and a store, and at the same time under a certain agreement not to carry on the same business within certain prescribed limits, it was held that the agreement being a part of the inducement to the purchase, was made upon a valuable consideration, and that parol evidence was admissible to establish it. But in these cases it will be observed that the parol contract was a direct inducement to the execution of the written contract, and that the contract did not in any way relate to the subject-matter of the parol contract.

Sec. 33. Several Writings may be looked at to determine the real Contract and Intention of the Parties.

Where two or more contemporaneous writings relating to the same subject-matter were entered into by the parties, the court may look to all of them for the purpose of ascertaining the real intention of the parties; and if there is any discrepancy between them, it is a question of fact for the jury what their real intention was,[1] provided the papers are all of equal solemnity with the principal document, and that no oral testimony is required for the purpose

[4] Pierce v. Woodward, 6 Pick. (Mass.) 206.

In a later case in Massachusetts, Wilson v. Sherburne, 6 Cush. (Mass.) 68, where the consideration of a note consisted in part of the price of a fish stand which had been paid and indorsed on the note, and in part of an agreement on the part of the payee not to engage in the fish business in competition with the promisor, and the terms and conditions of the sale were reduced to writing, which contained no reference to the good will of the business, it was held in an action on the note between the original parties that the promisor could not prove in defense that at the time of the sale *a verbal contract* was made that the payee would not engage in the fish business for a year, and that this agreement had been violated. In a still later case in that State, Doyle v. Dixon, 12 Allen (Mass.), 576, it was held that if a written contract is entered into by which one promises to give to another "a free and full possession of his stock and store for the full term of five years at a yearly rent as understood by both," for which a certain bonus and also a market price for the stock are agreed to be paid, parol evidence is not admissible to show that this was executed only as a memorandum and partial statement of the agreement for a special purpose, and that another independent oral agreement was made at the same time and upon the same consideration that the seller should not engage in a similar business in the same place for five years.

[1] Payson v. Lamson, 134 Mass. 593.

of connecting them therewith.[2] In a Massachusetts case[3] parol evidence was admitted to show the intention of the parties as to the payment of interest upon notes which upon their face did not bear interest. But in that case the notes were secured by mortgage upon real estate, which was conditioned to be void upon the pay-

[2] Leeds v. Lancashire, 2 Camp. 205; Hartley v. Wilkinson, 4 Camp. 127; Bell v. Bruen, 17 Pet. (U. S.) 761; Couch v. Meeker, 2 Conn. 302; Davlin v. Hill, 14 Me. 434; Lee v. Dick, 10 Pet. (U. S.) 482; Gale v. Williamson, 8 M. & W. 405; Hunt v. Livermore, 5 Pick. (Mass.) 395; Stone v. Metcalf, 1 Stark. 53.

[3] Payson v. Lamson, 134 Mass. 593. In this case notes and mortgage were paid, together with the interest thereon, and the defendants (the payers) brought an action against the plaintiffs to recover back the interest. The plaintiffs then brought a bill in equity to restrain the prosecution of the action at law upon the ground that the understanding of the parties was, that the notes were to bear interest, but through the fraud of the defendants, and through accident and mistake upon their own part, the notes were drawn without interest, and claiming that they were remediless at law. The court dismissed the bill, ALLEN, J., saying: "Where two papers are executed at the same time, relating to the same contract or transaction, both may be looked at for the purpose of showing what the actual contract or transaction was. If, on examination, it appears that they are in some respects inconsistent, as, for example, if a contract is executed in duplicate, and the two parts, which ought to be alike, are found to be different, or if a mortgage does not correspond with the note which it was intended to secure, it is apparent that the inconsistency must have occurred through some mistake or accident. It is certainly not to be supposed that the parties have understandingly intended to execute and deliver, as parts of the same transaction, papers which are inconsistent with themselves; and if it appears that they have done so, it is natural and reasonable to infer that one of the papers was so executed and delivered by mistake. In such case, *it not being apparent on the face of the papers which one expresses the real intention and agreement of the parties, there is no good reason why extrinsic evidence should not be received in a court of law to show the fact.* Each paper may be put in evidence as an admission or declaration of whatever is therein contained. An argument may also be drawn from the circumstances of any particular case that one of the papers would be more likely to express the true meaning of the parties than the other. But there is no legal presumption to that effect. There being then two inconsistent writings, both admissible as evidence of the transaction to which both relate, and there being no legal presumption in favor of either, but it being a question of fact which correctly represents the agreement of the parties, we should be slow to admit that a court of law, encountering such a state of facts, would be powerless to deal with it, and unable to consider other evidence to show which paper was delivered understandingly, and which through mistake. On the contrary, we are of opinion that, on the trial of the action at law, it would be entirely competent for the present defendants, on the one hand, to show by extrinsic evidence that the notes expressed the real understanding and agreement of the parties, or for the present plaintiffs, on the other hand, to show in like manner that the mortgage expressed such understanding and agreement.

"The decision of this court, when the action at law was before it on exceptions, was entirely consistent with this view. The presiding judge at the trial had ruled, as matter of law, that, by the terms of the mort-

ment of the aggregate amount of the notes within eighteen months from date, *with interest at the rate of six per cent.* per annum. So a party may show that certain letters written as to a contract already made were written at the suggestion of the other party for a purpose other than their apparent purpose and that they really

gage, the debt secured thereby was $30,000 and interest, and that it was not competent for the present defendants to prove that the notes constituted the entire mortgage debt, and that no other debt or claim existed or was intended to be secured than the notes without interest, and that the present plaintiffs had no right or claim to recover interest upon the notes, or in any way. This ruling was reversed by this court, and it was held that the mortgage was not conclusive as to the amount of the mortgage debt, that the notes might also be looked at, and that it might be shown by evidence that they expressed the true amount of indebtedness. That decision does not hold, and does not imply, that it would not be competent for the present plaintiffs to meet that evidence by showing that in fact the mortgage expressed the true amount of indebtedness. There is no intimation that the notes are the exclusive evidence for this purpose. Hampton Cotton Mills v. Payson, 130 Mass. 88.

"Nor is there anything in former decisions of this court which upholds that view. It has indeed often been held, in this State and elsewhere, that where there is some lack of conformity between a mortgage and the note which it was intended to secure, parol evidence is admissible to identify the note. Goddard v. Sawyer, 9 Allen (Mass.), 78, 80; Baxter v. McIntire, 13 Gray (Mass.), 168; Hough v. Bailey, 32 Conn. 288. So, on the other hand, it has been held that a mortgage is *prima facie* evidence of the existence of a debt corresponding with that described therein, and that the note is not the only evidence of the debt secured. Smith v. Johns, 3 Gray (Mass.), 517. So where a mortgage was given to secure two notes 'for the sum of $500,' and the notes, being produced and identified, were for $500 each, it was held that it might be shown by the notes and other evidence that they correctly represented the indebtedness secured by the mortgage. Crafts v. Crafts, 13 Gray (Mass.), 360. So where a person had guaranteed a note for $256, and took for his indemnity a mortgage which erroneously described the note as for $236, and his title as mortgagee was questioned by an attaching officer, on the ground that the mortgage was either fraudulent at the outset or had been discharged, it was held competent for him to produce the note, with evidence of its identity as the liability intended to be secured, for the purpose of showing that there was a real liability which had not been extinguished. It was entirely immaterial to ascertain whether the amount due was $236 or $256. The holder of the note was no party to the action. Johns v. Church, 12 Pick. (Mass.) 507, 23 Am. Dec. 651. So in a case where there was no inconsistency between the phraseology of the note and mortgage, it was held that the legal incident of three days' grace which attached to the note should be assumed to have been contemplated by the parties as incident to the mortgage debt, and that therefore a writ of entry to foreclose the mortgage for breach of condition could not properly be brought till after the expiration of the days of grace; and that in such case, there being but one promise to pay money, and there being no doubt as to the phraseology in which that promise was expressed, the note was the legitimate evidence of the promise. Coffin v. Loring, 5 Allen (Mass.), 153. There is nothing in any of these cases to show, or to imply, that the note will, as matter of law, be deemed to be the exclusive evidence of the mortgage debt, in a case where the note and mortgage

had no bearing on the contract.[4] Where two deeds taken together express the contract of the parties parol evidence is not admissible to contradict them.[5] On the issue whether certain papers were intended as part of one transaction, oral conversations between the defendants prior to delivery not communicated to the plaintiff, are not admissible.[6] Where a description of land in a deed refers to a map the map becomes by legal construction a part of the deed and is properly admisible in evidence and the map itself cannot be contradicted by extraneous evidence any further than it could be if actually inserted in the deed.[7] So a contract may be shown by parol to be the same contract referred to in a bond.[8] Where a party signed a contract to sell wall paper at "wholesale prices" evidence is inadmissible that at the time of the sale it was agreed upon that prices should be as in a certain list submitted as this is a variation of the contract. There was no claim that the list was to be a part of the contract but was omitted by fraud, accident or mistake.[9]

Sec. 34. As to Third Parties.

It is obvious, that written stipulations may be inserted in an instrument from various causes besides that of a conviction of the truth of what is expressed. So, for reasons sufficient to influence the immediate parties, the writing may be so fashioned as not to express the whole truth. While therefore, this conventional species of evidence will, in general, as between those who created it for their own purposes, conclude them, and others standing in the like predicament, from showing any intent contrary to or beyond what the writing expresses; those who had no agency in the matter ought not to be injuriously affected thereby. Therefore whenever it becomes material, strangers may aver and prove the real intention, as contradistinguished from the intention expressed.

are partially inconsistent with each other. In such case there is no presumption one way or the other, but the question is to be determined as a matter of fact."

[4] Boulevard Globe & Lamp Co. v. Kern Incandescent Gas Light Co., 67 N. J. L. 279, 51 A. 704.

[5] Sawyer v. Weaver, 131 U. S. cli, clii.

[6] Graham v. Middleby, 185 Mass. 349, 70 N. E. R. 416.

[7] Snooks v. Wingfield, 52 W. Va. 441, 44 S. E. 277.

[8] Nelson v. Willey, 97 Md. 373, 55 A. 527.

[9] Fawkner v. Lew Smith Wall Paper Co., 88 Iowa, 169, 55 N. W. 200, 45 Am. St. Rep. 230.

But they must have an interest in investigating and knowing the real truth, in other words, the fact of the interest sought to be established must be relevant for the exception in favor of strangers extends only to allow them to adduce parol testimony to prevent a fraudulent operation of the instrument upon their rights.[1] The rule that parol evidence will not be received to vary, explain or control a written instrument is confined entirely to actions between the parties thereto, or their privies in interest. In actions between strangers thereto, the real *facts* may be shown, or any fact that changes the legal effect of the contract, or shows the real intention, object or purpose of the contract;[2] and this is the rule also in cases where the contract is offered in evidence in an action between a stranger to the contract and one of the parties thereto;[3] nor does it apply in actions between the sureties, as they are not regarded as estopped, by the provisions of the contract, from showing any agreement between themselves, or the party for whom they became surety. The rule is confined exclusively to the parties actually contracting as principals.[4]

Therefore a written instrument may be contradicted by the party making it, when offered in evidence in a suit to which a stranger to the instrument is a party.[5]

So in a suit between a party to a written contract and a stranger to it, neither party is concluded by the terms of the writing, but either may show by parol that the contract was otherwise

[1] Wilson v. Mulloney, 185 Mass. 430, 70 N. E. R. 448; Walker Ice Co. v. American Steel, etc., Co., 185 Mass. 463, 70 N. E. R. 937; British & A. Mortg. Co., Limited, v. Cody, 135 Ala. 622, 33 So. 832; Krider v. Lafferty, 1 Whart. (Penn.) 303; Berlin v. Norwich, 10 John. (N. Y.) 229; *per* TAYLOR, J., in Brooks v. Maltbie, 4 S. & P. 106; Whitbeck v. Whitbeck, 9 Cow. (N. Y.) 270; Hayne v. Campbell, 6 Mon. (Ky.) 292; Johnson v. Blackman, 11 Conn. 351.

[2] So a contract to cut down lumber may be construed to be a mere revocable license, as between strangers to it. Bruce v. Roper Lumber Co., 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657.

[3] First Nat. Bank of Wayne v. Tollerton & Stetson (Neb., 1903), 97 N. W. 248; Barreda v. Silsbee, 21 How. (U. S.) 146; Blake v. Hall, 19 La. An. 49; Woodman v. Eastman, 10 N. H. 359; Edgerly v. Emerson, 23 N. H. 555; Farbush v. Goodwin, 25 N. H. 425; New Berlin v. Norwich, 10 Johns. (N. Y.) 229; Reynolds v. Magness, 2 Ired. (N. C.) L. 26; Hughes v. Sandal, 25 Tex. 162; Venable v. Thompson, 11 Ala. 147; Stradder v. Lambeth, 7 B. Monr. (Ky.) 589; Van Eman v. Starchfield, 10 Minn. 255; Thomas v. Truscott, 53 Barb. (N. Y.) 200; Woodman v. Eastman, 10 N. H. 359; Hughes v. Sandall, 25 Tex. 162; Bareda v. Silsbee, 21 How. (U. S.) 146; Blake v. Hall, 19 La. Ann. 49; Forbush v. Goodwin, 25 N. H. 425; Reynolds v. Magness, 2 Ired. (N. C.) 26.

[4] Thomas v. Truscott, *ante*.

[5] Venable v. Thompson, 11 Ala. 147.

than the writing shows.[6] So where a railroad is sued for the burning of certain buildings, it cannot object to the introduction of parol evidence by the plaintiff to the effect that a certain deed he gave of the land on which the buildings stood did not include them.[7] A party to a deed in an action brought against him by a third party may prove a contemporaneous oral agreement with the other party to the deed altering his rights in the property as shown in the deed.[8] The amount of consideration expressed in an agreement for sale of land is not conclusive, but may be shown by parol in an action by a real estate broker for his commission.[9] Evidence of negotiations prior to the making of a contract is competent in an action between one of the contracting parties and a third party.[10] In a controvery between a party to a contract and a stranger the parol evidence rule is not applied to what a partner said at the time articles for dissolution of the partnership were drawn up. This conversation is a part of the transaction and is competent evidence in his behalf in a suit between him and a third party.[11]

The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, is applied only in suits between the parties to the instrument and their privies in interest,[12] and does not apply to cases arising between sureties; it is limited to the stipulations between the parties actually contracting with each other by the written instrment.[13]

Sec. 35. Judicial, Corporate and Official Records.

A judicial record imports absolute verity on its face, and cannot be impeached by parol,[1] and all the questions relating to the time when it was, in fact, made, on what authority made, and whether its recitals are true or not, must be settled by reference to

[6] Stradder v. Lambeth, 7 B. Mon. (Ky.) 589.

[7] Olmstead v. Oregon Short Line R. Co., 27 Utah, 515, 76 Pac. 557.

[8] Carmack v. Drum, 32 Wash. 236, 73 Pac. 377.

[9] Witzel v. Zuel, 90 Minn. 340, 96 N. W. 1124.

[10] Livingston v. Stevens, 122 Iowa, 62, 94 N. W. 925; Livingston v. Heck, 122 Iowa, 74, 94 N. W. 1098.

[11] Marks & Stix v. Hardy's Administrator (Ky., 1903), 78 S. W. 864.

[12] Van Eman v. Stanchfield, 10 Minn. 255.

[13] Thomas v. Truscott, 53 Barb. (N. Y.) 200.

[1] Speirs Fish Co. v. Robbins, 182 Mass. 128, 65 N. E. R. 25; Rubel v. Title Guarantee & Trust Co., 199 Ill. 110, 64 N. E. R. 1033, where it was sought to prove that a judgment included an item of rent not appearing on the record. Murrah v. State, 51 Miss. 652; Driggs v. Morgan, 2 La. An. 151; Taylor v. Jones, 3 id. 619.

the record alone.[2] But when the precise hour of the day upon which a judgment was entered becomes important, and the record is silent upon that point, it may be shown by parol.[3] So where the record is silent as to the precise claim upon which the judgment was predicated, it may be shown by reference to the pleadings or by parol, as to identify the note on which it was rendered.[4] The parties to a judgment may be identified by parol;[5] and where proceedings are brought to correct a mistake in a judgment, evidence is admissible outside of the judgment to show the mistake.[6] Indeed, upon grounds of public policy, and that there may be an end to disputes, judicial records are held conclusive *as to the facts stated therein* as to the parties and their privies, and are a bar to all inquiry as to the truth or falsity of the facts stated therein.[7]

A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought never to be overthrown, or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.[8] A foreign judg-

[2] Herrington v. McCollom, 73 Ill. 476. Its date cannot be contradicted by parol. Wiley v. Sutherland, 41 Ill. 25.

[3] In Lansing v. Pawson, 38 Penn. St. 480, it was held that in an issue as to whether a judgment upon warrant of attorney was entered before the death of the defendant therein, it was not error to admit the testimony of the clerk who entered the judgment, that it could not have been entered earlier than eight o'clock in the morning.

[4] Where the record does not show on which of several issues presented by the pleadings judgment was in fact rendered it was competent to show this by evidence *aliunde*, not however to contradict the record but in support of it. Inhabitants of Embden v. Lisherness, 89 Maine, 578, 36 A. 1101, 56 Am. St. Rep. 442; Hood v. Hood, 110 Mass. 463; Nashua, etc., R. Corporation v. Boston, etc., R. R. Corporation, 164 Mass. 222, 226, 49 Am. Rep. 454; Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444; Hampton v. Dean, 4 Tex. 455; Parker v. Thompson, 3 Pick. (Mass.) 429.

[5] Root v. Fellows, 6 Cush. (Mass.) 29.

[6] Jenkins v. Long, 23 Ind. 460.

[7] Aldridge v. Haines, 2 B. & Ad. 408.

In an action in ejectment where the plaintiff's title depends on certain tax deeds the defendants may not attack the decree for sale which was the basis of the tax deeds by showing that the amount of the taxes was not stated in the decree as required by statute when signed by the judge but was filled in later. Haven v. Owen, 121 Mich. 51, 79 N. W. 938, 80 Am. St. Rep. 477, and note page 479.

[8] Fayerweather v. Ritch, 195 U. S. 276, 307, 25 S. Ct. 58, where testimony of the presiding judge was excluded. The record of a court may not be contradicted by a letter of a judge of the court. Bent v. Stone, 184 Mass. 92, 68 N. E. R. 46. Jurymen may not impeach their verdict by testimony that it did not include certain items which the jury had been instructed by the court to include in their verdict, as this would be a contradiction of the record. Oster v. Broe, 161 Ind. 113, 64 N. E. R. 918. Testimony by a referee

ment may be supplemented by proof of the law and practice in the foreign court, so it is open to one relying upon a foreign judgment in favor of a partnership to show that in the foreign court it is permissible to bring suit in the name of the partnership.[9] In general, a judgment *inter partes* will bind only the parties and their privies, but a judgment *in rem* is binding upon the world, even though it is not pleaded.[10]

The records of a corporation may be explained and read in the light of the surrounding circumstances,[11] and omissions in the records may be supplied.[12] Evidence will not be received to contradict the record of a public governing body, as a city council, where the law requires such a record to be kept, but extrinsic evidence may be received to show occurrences which through oversight, or some other cause, were not recorded,[13] and so of the official records

in bankruptcy that in allowing a claim he did not undertake to adjudicate on the creditor's right to retain two items in the claim alleged to be preferences is inadmissible as contradicting his judicial records. Clendening v. Red River Valley National Bank, 12 N. D. 51, 94 N. W. 901. But a magistrate's certificate in Massachusetts is not conclusive and where he certified that he had caused certain notices to be served he may testify who served them. O'Connell v. Dow, 182 Mass. 541, 66 N. E. R. 788.

[9] Fisher v. Fielding, 67 Conn. 91, 34 A. 714, 52 Am. St. Rep. 270.

[10] Hannsford v. Hun, 2 C. & P. 155; Magrath v. Hardy, 4 Bing. N. C. 796.

[11] Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va., 1905), 50 S. E. 890.

[12] Where no records of a corporation are kept, (Childs v. Ponder, 117 Ga. 553, 43 S. E. 986,) or where no record or written memoranda of the minutes of a stockholders' meeting are kept, the proceedings may be shown by parol evidence. Birmingham Railway & Electric Co. v. Birmingham Traction Co., 128 Ala. 110, 29 So. 187. Where the statute does not require a record of the action of the directors of an agricultural society, omissions in the corporate records may be supplied by parol. Ismon v. Loder, 135 Mich. 345, 97 N. W. 769. Where the records of a corporation show that the plaintiff was elected an officer in the corporation parol evidence is admissible to show a vote of the directors as to his salary, which vote was not in the record. Selley v. American Lubricator Co., 119 Iowa, 591, 93 N. W. 590. Where a journal of a municipal corporation shows that a certain ordinance was "passed by council," parol evidence is admissible to show the vote by which it was in fact passed. Gove v. Tacoma, 34 Wash. 434, 76 Pac. 73.

[13] Chippewa Bridge Co. v. City of Durand (Wis., 1904), 99 N. W. 603, 609. The acts of such boards as municipal officers or county commissioners which might receive for public use the property of individuals must be done with due formality and entered of record; the record by presumption of law shows the full proceedings and parol evidence cannot supply, extend or modify it. So even the testimony of the mayor of the city as to the location of a sewer is inadmissible in the absence of some record of municipal action. Kidson v. Bangor, 99 Me. 139, 58 A. 900. Where the statute requires the town clerk to keep a record of every vote of the town, his record is the only proper evidence of a vote and parol evidence of it is inadmissible. Cin-

of public officers.[14] Parol evidence is inadmissible of the purpose of members of a legislative body, as for instance a county board, in passing a certain enactment,[15] and no parol evidence may be admitted to explain or alter the journals of the legislature itself as they import absolute verity and truth.[16] The journal of the legislature kept as provided by the constitution cannot be varied or impeached by evidence of its untruth and of fraud in the clerks and members of the legislature who had to do with it.[17]

Sec. 36. Assignments.

Where property or choses in action are assigned by an instrument in writing, which upon its face purports to embrace the entire contract, it is subject, at law, to the general rule that parol evidence is not admissible to vary or contradict it,[1] but in equity such evidence is admissible to show that, although absolute in form, it is not so in fact,[2] as that an assignment of a mortgage to one person by name, was in fact intended for the benefit of another, as well as himself.[3] The real consideration of an assignment may be shown, even though the effect is to show the object of the assignment.[4] So fraud may be shown;[5] so, too, parol evidence may be

cinnati, I. & W. Ry. Co. v. People, 206 Ill. 296, 69 N. E. R. 40. A record of a public board duly certified by its secretary under its seal is conclusive and cannot be impeached by oral testimony from the secretary that a certain statement in the record had been interlined pending the suit in which it is offered and was not in the original record. State v. Main, 69 Conn. 123, 37 A. 80, 61 Am. St. Rep. 30. The record of a taxing board may be contradicted or added to by proof of the real facts in matters of taxation. State v. Aldridge, 66 Ohio, 598, 64 N. E. R. 562, but parol evidence is inadmissible to vary the records of the tax board by showing even by testimony of one of its members that it actually took action later than on the date set out in the record. Montana Ore Purchasing Co. v. Maher (Mont., 1905.), 81 Pac. 13.

[14] Where the record in the office of the Secretary of State shows that a bill was vetoed by the Governor, oral evidence is inadmissible to contradict this record by showing that the bill was originally filed with his approval upon it and subsequently returned and vetoed. People v. McCullough, 210 Ill. 488, 71 N. E. 602.

[15] Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

[16] Town of Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023.

[17] Taylor v. Beckham, 108 Ky. 278, 56 S. W. 177, 94 Am. St. Rep. 357.

[1] Osgood v. Davis, 18 Me. 146; Durgin v. Ireland, 14 N. Y. 822.

[2] Rhodas v. Farmer, 17 How. (U. S.) 464.

[3] Laeket v. Child, 11 Ala. 640; Brown v. Isbel, 11 id. 109. But see Aldrich v. Hapgood, 39 Vt. 617, where it was held that where an assignment was made ostensibly for the benefit of *three* persons, it could not be shown to have really been intended for the benefit of only one of the assignees.

[4] Lockwood v. Canfield, 20 Cal. 126; Galwey's Appeal, 34 Penn. St. 242.

[5] Russell v. Tuttle, 2 Root (Conn.), 22.

given to show and correct a merely clerical error therein, as in making up the schedule when a note or demand is misdescribed, for the purpose of identifying the note or demand and fixing the true amount, evidence of the mistake may be shown;[6] and if the assignment is general on its face and admitted to be for a different purpose, parol evidence of the intent of the parties may be given.[7] Evidence is not admissible to show that other property than that named in the agreement was intended to have been embraced therein;[8] nor can it be shown that an assignment of a mortgage was intended to be a discharge except for the purpose of proving fraud;[9] or that an assignment of stock under seal, which is absolute on its face, was intended as a mortgage;[10] or that, at the time when an assignment of stock was made, the assignor promised to make a good and effectual title thereto.[11]

Sec. 37. Negotiable Instruments.

The so-called "parol evidence rule" is much restricted in its application to negotiable instruments by the various peculiar rules of substantive law which govern them, such as the rule protecting *bona fide* purchasers and other doctrines taken from the law merchant. Evidence is inadmissible that a note absolute on its face was to be paid only out of a certain fund,[1] or only on some condition precedent,[2] or subsequent,[3] or was a mere receipt for an ad-

[6] Marsh v. Mandeville, 28 Miss. 122; Platt v. Hyde, 8 Iowa. 386.

[7] Moses v. Murgatroyd, 1 John. Ch. (N. Y.) 119.

[8] Driscoll v. Fiske, 21 Pick. (Mass.) 503; Taylor v. Sayre, 24 N. J. L. 647.

[9] Hamand v. Howard, 3 Met. (Mass.) 548.

[10] Bond v. Susquehanna Co., 6 H. & J. (Md.) 128. But this only applies in those States wherein the old distinction as to instruments under seal is preserved. See *contra*, Davis v. Crookston Water Works, etc., Co., 57 Minn. 402, 59 N. W. 482, 47 Am. St. Rep. 622; Gross v. Heckert, 120 Wis. 314, 97 N. W. 952.

[11] Osgood v. Davis, 18 Me. 146.

[1] Fuller v. Law, 207 Penn. 101, 56 A. 333. Dividends on certain stock.

[2] Torpey v. Tebo, 184 Mass. 307, 68 N. E. R. 223. Where a party giving a promissory note receives in return a contract of indemnity "in the payment" of the note he cannot show that the note was to be paid only upon certain contingencies, Prouty v. Adams, 141 Cal. 304, 74 Pac. 845. In an action by the payee of a note against the maker, the defendant may not show that the note was given for a scholarship or the right to attend a college, and was not to be paid unless the defendant actually used the scholarship. Jamestown Business College Ass'n v. Allen, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740.

[3] Jamestown Business College Ass'n v. Allen, 172 N. Y. 291, 64 N. E. R. 952. Evidence is incompetent to show that notes were delivered on condition that if a company is put into bankruptcy on account of the transaction in which the notes were

vancement.[4] But it may be shown by parol in what capacity the maker executed the note,[5] or that it was given without consideration for use by the payee as collateral, and he may also interpose a claim of set-off.[6] Parol evidence is admissible as between the immediate parties to the transaction to show their agreement as to the purpose and effect of an endorsement on a promissory note.[7] Where a person other than the payee writes his name on the back of a note, his contract may be shown by parol,[8] even though the words "waiving demand and notice" indicative of a regular indorser are placed above the indorsement.[9] Evidence will not be received of an agreement contradictory of the instrument,[10] unless to

given the notes were to be null and void. Central Savings Bank v. O'Connor, 132 Mich. 578, 94 N. W. 11.

[4] Parol evidence is inadmissible to show that a note executed by a son to a father is really a receipt for an advancement made by the father out of his estate to the son. Schmidt v. Scmidt's Estate (Wis., 1904), 101 N. W. 678. *Contra*, Brook v. Latimer, 44 Kan. 431, 24 P. 946, 21 Am. St. Rep. 292.

[5] Parol evidence is admissible to show that one signed a promissory note as a witness only, who affixed his signature to the lower left hand corner of the note where witnesses usually sign. Aultman & Taylor Co. v. Gunderson, 6 S. D. 226, 60 N. W. 859, 55 Am. St. Rep. 837. Where a note is given by one personally parol evidence is admissible to show that he signed it as a partner in behalf of a partnership and on that question the statement of the maker at the time of execution as to the account on which he made the note is admissible as part of the *res gestae*. Beckwith v. Mace (Mich., 1905), 103 N. W. 559.

[6] Brown v. Smedley (Mich., 1904), 98 N. W. 856; Clark v. Ducheneau, 26 Utah, 97, 72 Pac. 331, note as collateral.

[7] Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507; Jaster v. Currie (Neb., 1903), 94 N. W. 995. An indorsement of a promissory note by A. "pay to the order of B." may be explained by parol except as against a *bona fide* holder, by showing that title was never intended to pass to B. Ragsdale v. Ragsdale, 105 La. 405, 29 So. 906. But it is held in some States that one indorsing a note regularly, that is, under the signature of the payee, is conclusively presumed to be liable as second indorser to a subsequent party whether the latter is an innocent purchaser or not and he cannot show by parol that he signed as a witness or a guarantor. Bowler v. Braun, 63 Minn. 32, 65 N. W. 124, 56 Am. St. Rep. 449; Barringer v. Wilson (Tex., 1904), 80 S. W. 994.

[8] Carter v. Long, 125 Ala. 280, 28 So. 74; Young v. Schon, 53 W. Va. 127, 44 S. E. 136; Heidenheimer v. Blumenkron, 56 Tex. 308. Parol evidence is admissible to show that an endorser of a note signed it before delivery as additional security to the payee and therefore is liable as a joint maker. Bank of Jamaica v. Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100.

[9] Richardson v. Foster, 73 Miss. 12, 18 So. 573, 55 Am. St. Rep. 481.

[10] The drawer of a bill of exchange cannot show a parol agreement with the payee not to hold the drawer responsible for any default on the part of the payee. Bryan v. Duff, 12 Wash. 233, 40 P. 936, 50 Am. St. Rep. 889. An endorsement of a promissory note "without recourse" cannot be varied by evidence of a parol agreement of guaranty by the indorser. Youngberg v. Nelson, 51 Minn. 172, 53 N. W. 629, 38 Am. St. Rep. 497. Where an absolute prom-

show illegality,[11] or the consideration as between immediate parties,[12] or where the instrument is ambiguous on its face.[13]

Sec. 38. Bills of Lading.

Bills of lading are regarded as of a dual nature, being both receipts and contracts, and, so far as they partake of the nature of receipts, parol evidence is admissible to explain or vary them, as to that extent, they are only regarded as *prima facie* evidence.[1] But, so far as the bill expresses the actual contract between the carrier and shipper, parol evidence is not admissible to alter, vary or explain it.[2] The bill of lading, to the extent that it confesses the delivery and acceptance of the goods by the carrier, is a receipt. In other respects it is a contract, and the contract particularly covers the obligation of carrying the goods to destination and of delivering them to the consignee.[3] Thus it is held that a bill of lad-

issory note is given reciting that it is in settlement of an old note evidence is incompetent even as between the original parties to the note to vary it by any evidence of a contemporaneous parol agreement. American Harrow Co. v. Dolvin, 119 Ga. 186, 45 S. E. 983. Where a note is made expressed to be for the purchase of a horse the seller may not show by parol evidence that he warned the buyer of certain defects in the horse and sold it subject to those defects, Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711, and the buyer may not show a contemporaneous parol agreement to return the horse in exchange for the note if the horse should not prove satisfactory. Thisler v. Mackey, 65 Kan. 464, 70 Pac. 334.

[11] Parol evidence is admissible to show that a note on its face payable with interest at 10 per cent. is in reality by verbal agreement payable with interest at 20 per cent., which latter rate is usurious. Roe v. Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288.

[12] As between an indorsee and his immediate indorser the consideration is always open to inquiry. Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006.

[13] Where a note is signed by two parties payable to the order of "myself" parol evidence is admissible to show which of the two makers is meant by the word "myself." Jenkins v. Bass, 88 Ky. 397, 11 S. W. 293, 21 Am. St. Rep. 344.

[1] Steamboat Missouri v. Webb, 9 Mo. 193; Sutton v. Kettell, 1 Sprague (U. S. C. C.), 309; The Tusket, id. 71; Great Western R. R. Co. v. McDonald, 18 Ill. 172; Hendricks v. Steamer Morning Star, 18 La. An. 353; Baltimore, &c., Steamboat Co. v. Browne, 54 Penn. St. 77; O'Brien v. Gilchrist, 34 Me. 554; Atwell v. Miller, 11 Md. 348; Graves v. Harwood, 9 Barb. (N. Y.) 77; McTyer v. Steele, 26 Ala. 487; Wolfe v. Myers, 3 Sandf. (N. Y.) 7. A bill of lading may or may not be the whole contract between the parties. Whether it is the entire contract or nothing more than a receipt is a question of fact for the jury as to which parol evidence is admissible. Bank of British North America v. Cooper, 137 U. S. 473, 477, 11 S. Ct. 160.

[2] McTyer v. Steele, *ante;* Steamboat Missouri v. Webb, 9 Mo. 193; Cheeny v. Holly, 14 Wend. (N. Y.) 26; Jones v. Warner, 11 Conn. 40; Cox v. Paterson, 30 Ala. 608; Arnold v. Jones, 26 Tex. 335; Shaw v. Gardner, 12 Gray (Mass.), 488; Gardner v. Chase, 2 R. I. 112; White v. Van Kirk, 25 Barb. (N. Y.) 16.

[3] Sonia Cotton Oil Co. v. The Red River, 106 La. 42, 30 So. 303.

ing or railroad receipt which states that the goods are received in good order, is to that extent only a receipt, and does not estop the carrier from showing that the goods were really in a damaged condition. But such proof must be confined to defects not known to the carrier when the receipt was given.[4] A recital in a bill of lading that the shipper releases the carrier from liability in consideration of the reduced rate charged for freight is not conclusive, but is open to evidence that the regular rate was charged.[5] It may be shown by parol that the endorsement and delivery of a bill of lading to a bank was merely for collection, as such evidence does not contradict the endorsement, but merely shows its purpose.[6]

But a bill of lading may be varied by a subsequent parol agreement, and such supplemental contract may be shown by parol evidence.[7]

Sec. 39. Bills of Sale.

Bills of sale absolute upon their face, cannot be shown by parol to be in fact only intended as collateral security, particularly where the right of third persons will be affected by such proof.[1] But in order to exclude such proof, they must express a contract;

[4] Blade v. Chicago, &c., R. R. Co., 10 Wis. 4.

[5] Lake Erie & W. R. Co. v. Holland, 162 Ind. 406, 69 N. E. R. 138.

[6] Walker v. First National Bank, 43 Ore. 102, 72 Pac. 635.

So to show an error or mistake as to the quantity of goods. Graves v. Howard, 9 Barb. (N. Y.) 477. So, where it is signed by an agent to show who the principal is. Goddard v. Mullany, 52 Barb. (N. Y.) 87. But representations made by the carrier before the bill of lading was executed, as to the depth of water at the place of landing, cannot be given in evidence by him to excuse his liability for a loss of the goods or injury thereto, Shaw v. Gardner, 12 Gray (Mass.), 488; nor that an additional quantity of goods should be carried. Sayward v. Stevens, 3 id. 97; or that the rate of transportation was to be dependent upon the price obtained for the goods. Gardner v. Chase, 2 R. I. 112; nor indeed in *any* case where the effect of the evidence is to vary the terms of the contract as expressed in the bill. Arnold v. Jones, 26 Tex. 335; White v. Van Kirk, 25 Barb. (N. Y.) 16.

A carrier may show that the articles receipted in the bill of lading were not in good order. Ellis v. Willard, 10 N. Y. 529. But the contract embraced in the bill of lading cannot be contradicted or modified by parol evidence. Fitzhugh v. Winan, 10 N. Y. 559, as by proof of custom. Simmons v. Law, 8 Bosw. (N. Y.) 213. You cannot vary or contradict the bill of lading as to the course designated in it which the vessel is to take. So *a clean bill of lading*, which imports that the goods are stowed *under deck*, cannot be varied by a contemporaneous parol contract that they were to be stowed *on deck*. Cherry v. Holly, 14 Wend. (N. Y.) 26; Barber v. Brace, 3 Conn. 9.

[7] Atwell v. Miller, 11 Md. 348.

[1] Sanborn v. Chittenden, 27 Vt. 171; Champlin v. Butler, 18 John. (N. Y.) 169; Hazard v. Loring, 10

a mere bill of goods, as that A. bought of B. certain articles at a certain price, "six per cent. off for cash," is not a contract, and is open to parol proof to show any fact connected with and material to the transaction.[2] So where a bill of sale is made of a mill the buyer may show by parol that certain timber not mentioned in the bill of sale was included in the purchase.[3] Where, however, the bill of sale is in the nature of a contract, it is, like all other contracts, presumed to embody all that was agreed upon between the parties, and is not open to explanation by parol, but is subject to the same rules in this respect as other contracts. Thus, where a sale of property, reduced to writing, contains all the elements requisite to show a contract between the parties, but contains no warranty of the goods, parol proof is not, in the absence of fraud, admissible to show a warranty in fact.[4] In a suit between other parties it may be shown that a bill of sale was intended as a mortgage.[5]

Cush. (Mass.) 269; Hayward v. Wallace, 4 Strobh. (S. C.) 181.

[2] Linsley v. Lovely, 26 Vt. 123; Silliman v. Tuttle, 45 Barb. (N. Y.) 171; Filking v. Whyland, 24 N. Y. 338; Dana v. Fiedler, 12 id. 40; Wentworth v. Buhler, 3 E. D. S. (N. Y. C. P.) 305.

[3] Welever v. Advance Shingle Co., 34 Wash. 331, 75 Pac. 863.

[4] Houghton v. Carpenter, 40 Vt. 588; Jolliffe v. Collins, 21 Mo. 338; Heyward v. Wallace, 4 Strobh. (S. C.) 181; Pickard v. McCormick, 11 Mich. 68.

So where a business, with all the good will belonging thereto, is conveyed by a bill of sale, parol proof is not admissible to show that the vendor agreed not to establish a similar business in the town, Smith v. Gibbs, 44 N. H. 335; or to show that a bill of sale was merely intended as a trust, Owen v. Sharp, 12 Leigh (Va.), 427; Trumbo v. Cartwright, A. K. Marsh. (Ky.) 532; or that it was merely intended as an assignment, Frasier v. Sneath, 3 Nev. 120; or that a sale was made by two persons when the bill of sale was only executed by one, Wren v. Wardlaw, Minor (Ala.), 363; or that it was given merely to enable the vendee to get possession of the property as agent of the vendor, McClenney v. Floyd, 10 Tex. 150; or that it was intended to embrace other property than that named therein, McCloskey v. McCormick, 37 Ill. 66; or that property within its provisions was in fact excepted, Harrell v. Dorrance, 9 Fla. 490; nor to show that the title and possession of the property was not to vest in the vendee immediately, Rennell v. Kimball, 5 Allen (Mass.), 356; nor in fact to vary in any respect the terms or conditions of the sale. Peaslee v. Stafford, 1 N. Chip. (Vt.) 173; Davis v. Moody, 15 Ga. 175. But it must be remembered that, in order to exclude such proof, the bill of sale must contain all the essential elements of a contract, leaving nothing open to parol proof. As to whether it is a contract which the courts can reasonably construe is a question for the court. Houghton v. Carpenter, 40 Vt. 588; Pickard v. McCormick, 11 Mich. 68; Linsley v. Lovely, 26 Vt. 123.

[5] Pacific Coast Biscuit Co. v. Dugger, 42 Ore. 513, 70 Pac. 523.

Sec. 40. Leases, Deeds and Mortgages.

It is not competent to show by parol that certain other premises were intended to be included in a lease, or that certain premises named therein were intended to have been excluded, or to add to it terms not therein contained,[1] or to show that more or less rent was agreed upon.[2] A written lease may not be waived by parol evidence of a contemporaneous oral agreement that the rent was to be different from that stated in it; or that it was to be apportioned;[3] or that it was to be paid at a different time from that named in the

[1] Barton v. Dawes, 10 C. B. 261; Meres v. Ansell, 3 Wils. 275; Norton v. Webster, 12 Ad. & El. 442; Hope v. Atkins, 1 Price, 143. Where the lease contains no warranty, express or implied, that the premises are fit for occupation, it is not competent to show that the landlord represented them to be so. Dutton v. Gerrish, 9 Cush. (Mass.) 89. Where an assignment of a lease is made in writing, it is not competent to show that the assignee agreed to pay the accrued rent. Graves v. Porter, 11 Barb. (N. Y.) 192. Where a lease abrogates a previous written agreement, it is not competent to show that it was not intended to have that effect. Tibbetts v. Percy, 24 Barb. (N. Y.) 39. Under a lease of coal mines, containing no stipulation as to the quantity of coal to be mined, but fixing a certain sum per bushel as the rent to be paid, parol evidence is not admissible to show that the lessee agreed to mine any particular quantity, or even all that he could. Lyon v. Miller, 24 Penn. St. 392. When a party seeks to enforce a written contract, although the defendant cannot introduce parol evidence to alter or vary it, yet, if the plaintiff introduces evidence as to a contract not embraced in the writing, the defendant is at liberty to introduce evidence of a different contract for the purpose of contradicting the plaintiff's evidence, although it has the effect to vary the terms of the written contract. Arbeiter v. Day, 38 Conn. 155. Where there is no latent ambiguity, parol evidence is not admissible. Thus, where lands leased were bounded on the north line of a town, parol evidence was held inadmissible to show that a different line had been understood by the parties to be the true boundary. So where a lease was in writing, and there were only *two* exceptions therein, it was held that it could not be shown by parol that the lessor *intended* to make still another, Haney v. Newton, 7 Pick. (Mass.) 29; and generally it may be said that parol evidence is not admissible to prove an agreement that directly contradicts the lease, Jungerman v. Bovee, 19 Cal. 354; Carpenter v. Shanklin, 7 Blackf. (Ind.) 308; or that it was intended to have a different effect from that which it purports to have, as, that it was intended as a mortgage, Stewart v. Murray, 13 Minn. 426; or that it was understood that the lessee might occupy the premises for *any* purpose, when the use was specially restricted in the lease. Sientes v. Odier, 17 La. An. 153.

[2] A written lease may not be varied by parol evidence of a contemporaneous oral agreement that the rent was to be different from that stated in it. Merchants' State Bank v. Knettell, 12 N. D. 519, 97 N. W. 853.

[3] Flinn v. Calow, 1 M. & G. 589; Preston v. Merceau, 2 W. Bl. 1249. But if no rent is named in the lease, parol evidence is admissible to show what rent was agreed upon. King v. Woodruff, 23 Conn. 56.

lease;[4] or that the lease was to commence at a later date;[5] or that the tenant was to pay the taxes, etc.;[6] or that other rights and privileges than those named in the lease were given;[7] or that the landlord agreed to repair the premises;[8] or, indeed, where the lease is explicit, is parol evidence ever admissible to aid in its construction.[9] Where a written lease contains a covenant by the lessee to "write $400 insurance on building," parol evidence is inadmissible to show an oral agreement that the lessee was to maintain this insurance during his occupancy. The court finds that insurance was a matter covered in the lease and to admit proof of a collateral agreement "it must appear that the alleged collateral promise relates to a subject distinct from that to which the writing relates."[10] A lease of gas rights cannot be varied by evidence of a contemporaneous parol agreement that the lease should be forfeited whenever the lessee should fail to furnish gas for certain purposes.[11] But where part of the rent under a lease was " to be worked out on farm at one dollar per day" parol evidence is admissible to show when and what kind of work was to be done under a contemporaneous

[4] Thus, in Carpenter v. Shanklin, 7 Blackf. (Ind.) 308, by lease of real estate executed by the lessor and lessee, under their seals, for one year, the time fixed for the payment of the last half year's rent was February 1, 1841. It was held, that parol evidence that the said rent was not due until March 1, 1841, was inadmissible: also, that the landlord, in such case, had a preference for said rent over an execution levied February 1, 1841, on the tenant's goods.

[5] Henson v. Cooper, 3 Scott's N. R. 48.

[6] Rich v. Jackson, 4 Br. P. C. C. 514, cited and reported in full in note *c*, 6 Ves. 334.

[7] Jungerman v. Bovee, 19 Cal. 354; Sientes v. Odier, 17 La. An. 153. But where the lease provides that he shall hold the lease subject to "Manor regulations," or "municipal regulations," etc., the lessee may show by parol what such regulations are. Dorsey v. Eagle, 7 G. & J. (Md.) 321. Where certain specific exceptions are made in a lease, it cannot be shown by parol that other exceptions were agreed upon. Hovey v. Newton, 7 Pick. (Mass.) 29.

[8] Mayer v. Muller, 1 Hilt. (N. Y. C. P.) 491; Post v. Vetter, 2 E. D. S. (N. Y. C. P.) 248; New York v. Price, 5 Sandf. (N. Y. Sup. Ct.) 542; Howard v. Thomas, 22 Ohio St. 201. Where a lease is silent on the question of repairs, evidence of a contemporaneous agreement that the landlord should make certain repairs prior to occupation, is not admissible as such agreement is not collateral to the lease but part of the bargain to rent the property. Thompson Foundry & Machine Works v. Glass, 155 Ala. 669, 672, 33 So. 811. But where a written lease shows only the obligations of the tenant a contemporaneous parol agreement may be proved to the effect that the landlord was to put the premises in safe condition. Hines v. Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823.

[9] 2 Best on Evidence (Wood's ed.), note, page 888.

[10] Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588.

[11] Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 Pac. 625.

parol agreement.[12] Where a lease is made by several owners of gas lands, and royalties for gas produced are to be paid to the "parties of the first part" who are the lessors, parol evidence is admissible to show that by a contemporaneous parol agreement between the lessors these royalties were to be paid to the owner of the parcel of land on which the gas should be produced.[13] Where a seal is unnecessary, as on a lease, its presence does not *ipso facto* bar the introduction of parol evidence.[14] But as previously stated, there are exceptions to the rule, and in addition to those exceptions it may be said that parol evidence is always admissible to defeat the lease, as, to show that it was made for an illegal purpose,[15] or that certain formalities required by law were not observed;[16] or, indeed, fraud or anything that tends to show that the deed is void in law may be shown.[17] So, too, it is competent to show by parol evidence to what premises the lease applies, when, although the lease upon its face is clearly enough expressed, yet an ambiguity arises from extrinsic circumstances.[17a]

[12] Ingram v. Dailey, 123 Iowa, 188, 98 N. W. 627.

[13] Rymer v. South Penn. Oil Co., 54 W. Va. 530, 46 S. E. 559.

[14] Woolsey v. Henke (Wis., 1905), 103 N. W. 267.

[15] Doe v. Allen, 8 T. R. 148; Rex v. Northwingfield, 1 B. & Ad. 912; Lightfoot v. Tenant, 1 B. & P. 555. Where fraud or illegality are averred, parol evidence is always admissible to establish it, whatever may be its effect upon the contract. Thus, it may be shown that a material part of the contract has been inserted or altered by the fraud of the other party. Baltimore Steamboat Co. v. Brown, 54 Penn. St. 77; Pierce v. Wilson, 34 Ala. 596; Townsend v. Cowler, 31 id. 428; Hunter v. Biglyon, 30 Ill. 228; Hamilton v. Congers, 28 Ga. 276; Sanford v. Handy, 23 Wend. (N. Y.) 126; Akin v. Drummond, 2 La. An. 92; Gatting v. Newell, 9 Ind. 572; Davis v. Stern, 15 La. An. 177; Bartle v. Vosburg, 2 Grant's Cas. (Penn.) 277; Selden v. Myers, 20 How. (U. S.) 506; or that the other party by fraud has prevented the reduction of the whole contract to writing. Phyfe v. Wardwell, 2 Edw. Ch. (N. Y.) 47; Elliott v. Conwell, 13 Miss. 91; Wesley v. Thomas, 6 H. & J. (Md.) 24; Kennedy v. Kennedy, 2 Ala. 571; Chetwood v. Britain, 2 N. J. Eq. 438; Sull v. Cass, 43 N. H. 62; Martineau v. May, 18 Wis. 54. As to proof of illegality, see Lazare v. Jacques, 15 La. An. 599; Corbin v. Sistrunk, 19 Ala. 203.

[16] Kelfe v. Ambrosse, 7 T. R. 551.

[17] Goodwin v. Hubbard, 15 Mass. 219; Boyer v. Grundy, 3 Pet. (U. S.) 219; Russell v. Rogers, 15 Wend. (N. Y.) 351; Prentiss v. Russ, 16 Me. 30; Wren v. Woodrow, 1 Ala. 363. Where fraud is alleged, any consideration or fact, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction. Roscoe's Ev. (13th ed.) 22; Paxton v. Popham, 9 East, 421; for fraud is an extrinsic and collateral matter that avoids all transactions, and the same is true as to illegality. Chandler v. Ford, 3 Ad. & El. 649; Collins v. Blantern, 2 Smith's S. C., *notes*.

[17a] Thus, where the lease is of "The Lanier House," it is competent to show what premises are connected and used with it, and what extent of building and grounds are included under the expression, and testimony as to what was ordinarily meant in

But, if the description of the premises of itself affords ample means of ascertaining or defining the premises intended to pass, it is not competent to show by parol that the lease was intended to apply to other premises, even though there are errors or incon-

that locality by the words is admissible, Harris v. Dub, 57 Ga. 77; Sargent v. Adams, 3 Gray (Mass.), 72; or what premises are understood to be embraced in the words "my home farm," or any other *general* description of premises. Hutchins v. Scott, 2 M. & W. 816; Hutchins v. Groom, 5 C. B. 515. Where there was an agreement in writing to lease for a term of years "The Adams House, situate on Washington street, Boston," it was held that it might be proved by parol to have been intended by the parties to include only so much of the building as was fitted up as a hotel, by the name of the Adams House, and not the separate shops which occupied the whole of the ground floor, except the entrance to the hotel. Sargent v. Adams, 3 Gray (Mass.), 72. Whether certain premises are or are not embraced in the lease, when the lease does not explicitly describe them, is always open to parol proof. Crawford v. Morris, 5 Gratt. (Va.) 90; Guy v. Barnes, 29 Ind. 103; Corbett v. Costello, 8 La. An. 427; D'Aquin v. Barbour, 4 id. 441. In Chamberlain v. Letson, 5 N. J. L. 152, the lease demised a "house and lot containing three acres, more or less." The lessee claimed *seven* acres, the whole being in one lot not separated by a fence. Parol evidence was admitted to show that the original lot connected with the house was about three acres; that the lessor added about four acres by purchase, and occupied the whole at the time of the demise, and that the lease was intended by the parties to cover only the original three acres, visible remains of the old original line being still visible. A call in a grant for a line beginning at the "north corner of R.'s store," where the store stands squarely east and west and has *two* north corners, is a latent ambiguity and may be explained by parol proof. Lawrence v. Hyman, 79 N. C. 209. Thus, a building misdescribed as number 38, may be shown in fact to mean number 35. Hutchins v. Scott, *ante*. And even though such a lease was void to create any interest, if the tenant went into possession of the premises intended, it would be admissible to prove the terms of the tenancy. Bealand v. Hurst, 3 Starkie, 60. Especially would this be so, if it was shown that the lessor owned number 35, and did not own number 38, and that the tenant had gone into possession of 35 under the lease. But if the landlord owned both, and there was nothing in the lease to indicate that 35 instead of 38 was intended, and the tenant had not gone into possession under the lease, it would not be competent in a court of law to show that 35 was intended. Where a grant is in general terms, the addition of particular terms operates as a restriction and limitation upon the grant. Thus, if a lease is of "the premises on the corner of College and Centre street," the whole of the premises there situated owned by the lessor will pass; but if, in addition thereto, the words "recently occupied by E. Laporte as a French hotel" are added, the latter clause limits the grant to such part of the premises as were occupied by E. Laporte for a French hotel, and no more and no less will pass. Therefore, the extent of the grant being rendered uncertain by such restrictive clause, parol evidence is admissible to show what part of the premises was occupied by E. Laporte for a French hotel, and thus to define the extent of the demise. Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 117. See, also, Nutting v. Herbert, 35 N. H. 125; Connolly v. Vernon, 5 East, 51. See, also, to the same effect, Bell v. Sawyer, 32 N. H. 72; Tenney v. Beard, 5 id. 58; Hibbard v. Hurlburt, 10 Vt. 173; Sargent v. Adams, 3 Gray (Mass.), 72; Mitchell v. Stevens, 1 Aik. (Vt.) 161; Putnam v. Smith, 4 Vt. 622. In Free-

sistencies,[18] and the actual intention of the parties is in opposition to the strict letter of the lease.[19] It is not, however, permissible to aid an inherently insufficient description in a lease by parol evidence of what the parties intended to include therein.[20]

Where the language of a lease is illegible from age or other causes, and the construction is doubtful from antiquity, parol evidence is admissable to show what its provisions are, as well as to aid in its construction in any doubtful matter.[21] So parol evidence is admissible to explain a latent ambiguity in a deed or lease. It is a rule of construction that in order to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract to the subject-matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. "The law does not deny to the reader the same light and information that the writer enjoyed; he may acquaint himself with the persons and circumstances that are the subjects of the allusions and statements in the written agreement, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the

land v. Burt, 1 T. R. 701, the demise was of certain premises in Westminster "late in the occupation of A.," particularly describing them, and was held to extend only to such part of the premises as A. occupied, and a cellar under the yard belonging to the premises, which was in the possession of another tenant, was held not embraced in the grant; and in ejectment for the premises, it was held that the landlord might show what part of the premises A. occupied, and that the cellar did not pass under the grant. In Jackson v. Perine, 35 N. J. L. 137, the court laid down the rule, that where the language of the grant admits of but one construction, and the location of the premises intended to be conveyed is already ascertained by a description in the deed, either by courses and distances or monuments, no other exposition derived either from the language or acts of the parties is admissible; but, *where the language is equivocal, and the location of the premises is made doubtful, either by the insufficiency of the description or the inconsistency of two or more parts of the description*, the construction put upon the grant by the parties in locating the premises may be resorted to. See, also, McLaughlin v. Bishop, 35 id. 512; Thomson v. Wilcox, 7 Lans. (N. Y.) 376. See § 17, *ante, as to description of real estate.*

[18] Vose v. Bradstreet, 27 Me. 156; Norwood v. Byrd, 1 Rich. (S. C.) 135; Phillips v. Castley, 40 Ala. 486; Todd v. Philhamer, 24 N. J. L. 796; McLaughlin v. Bishop, 35 N. J. L. 512; Eggleston v. Bradford, 10 Ohio, 312; Campbell v. Johnson, 44 Mo. 247; Bratton v. Clawson, 3 Strobh. (S. C.) 135.

[19] Tracy v. Albany Ex. Co., 7 N. Y. 474.

[20] Description "beginning eighty rods easterly of the southwest part of my farm," void for uncertainty. Goodsell v. Rutland-Canadian R. Co., 74 Vt. 206, 56 A. 7.

[21] Best on Evidence, 198, *n. a.*

words and of the correct application of the language to the things described."[22]

From the admission of such evidence, and from bringing the words of the written instrument into contact with surrounding circumstances, a doubt sometimes arises as to the correct application of the language and words used to the subject-matter of the contract and the objects professed to be described; this is called a *latent ambiguity,* because it is not apparent upon the face of the contract, but arises from the application of the words to the objects to which they refer. "As this difficulty or ambiguity is introduced solely by the admission of extrinsic evidence of surrounding circumstances, it may be rebutted and removed by the production of further evidence of the identity of the objects described, in accordance with the ancient maxim, '*Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*'"[23] The written instrument may also,

[22] Shore v. Wilson, 9 Cl. & Fin. 555, 569.

A lease had been made by the plaintiff to the defendant, of part of a messuage, together with a piece of ground thereunto adjoining. This piece of ground was used as a yard, and beneath the surface thereof was a cellar, occupied by a third party under a lease previously granted to him by the plaintiff. The occupant of the cellar continued to reside in it, and to pay rent to the plaintiff for three or four years after the latter had demised the yard to the defendant, but his lease having expired, and he having quitted the cellar, the defendant took possession of it, contending that the cellar had passed to him by the demise of the yard, upon the maxim of the common law, "*Cujus est solum, ejus est usque ad coelum et ad inferos,*" and that the plaintiff was estopped from introducing parol evidence to control or qualify the operation of the lease; but the court held that parol evidence of the surrounding circumstances might properly be brought in aid of the construction and interpretation of the lease. "The only question," observes ASHURST, J., "is whether the court are absolutely bound by the terms of this lease to put the construction upon it for which the defendant contends. *Prima facie,* indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances, and it seems to me that the construction of all deeds must be made with reference to their subject-matter, and it may be necessary to put a different construction upon leases made in populous cities from that on those made in the country; we know that in London different persons have several freeholds over the same spot, and that different parts of the same house are let out to different people." Freeland v. Burt, 1 T. R. 703; Press v. Parker, 10 Moore, 158; Wigram, 39, 58 (2d ed.), 20 Law J. Q. B. 67.

[23] TINDAL, C. J., Miller v. Travers, 1 M. & Sc. 345, Bac. Max. 23.

This may be illustrated and exemplified by a case analogous to the one mentioned by Pothier. "You rent of me an apartment in a house, the remainder of which is occupied by myself. I make you a new lease in these terms: 'I agree to let, and A. B. agrees to occupy my house in Frederick street, for the term of two years from the date hereof, at the annual rent of 20*l.*' Any one on reading this agreement would imagine

on the face of it, be perfectly intelligible, and free from all doubt and obscurity, but from some of the circumstances admitted in proof, an ambiguity arises, as to which of two or more things, or which two or more persons, each answering the words of the writing, the parties intended to designate. There may, for example, be two estates, or two persons of the same name and description, and the words may equally apply to either. This doubt or difculty, which has been created by parol evidence, may be removed by further evidence of a like character, calculated to explain which of the estates or persons is embraced by the description in the written instrument.[24] But the evidence, when introduced, must

that the whole house was intended to be demised, but when evidence of extrinsic circumstances is admitted, for the purpose of applying the language of the contract to the subject-matter thereof, a doubt at once arises, whether it was intended that you should have the whole house or the mere apartment which you had previously occupied; and this doubt, which is suggested purely by extrinsic evidence of the relative situations and circumstances of the parties at the time of the making of the contract, may be removed by parol evidence of other circumstances calculated to explain the sense in which the words were used, and to give them a correct application."

[24] Gord v. Needs, 2 M. & W. 140; Hiscocks v. Hiscocks, 5 M. & W. 368; Wigram, pp. 86, 88. See Hammond v. Ridgely, 5 H. & J. (Md.) 255; Lowell v. Parkhurst, 4 Wend. (N. Y.) 369. In Crawford v. Morris, 5 Gratt. (Va.) 90, where there was a written agreement to renew a lease, it was held that parol evidence was admissible to show *that the cellar of an adjoining tenement had been occupied with the premises to which the lease applied, and was necessary for the prosecution of the tenant's business*, for the purpose of showing that it was included in the lease to be renewed. In Midlothian, &c., Co. v. Finney, 18 Gratt. (Va.) 304, the lessor, about six months after giving a lease of certain coal mines for a term, indorsed upon the lease a lease of *adjoining* coal lands for the residue of the term, declaring it to be a part of the original lease, and after such indorsement, and before the term expired, he agreed to renew the lease. Parol evidence was held admissible to show whether or not the lands of the *indorsed* lease were intended to be embraced in the renewal. In Wing v. Gray, 36 Vt. 261, there was a clause in the lease as follows: The lessee "is to have all the personal property on the farm," and it was held that parol evidence was admissible to show whether it was meant that he should have the *use* of the property, or that it should be his absolutely. In a New York case the defendant C., having a lease of a store, underlet to A. the whole of the first floor excepting a portion thereof which was then partitioned off, and which consisted of the stairway, with a hatchway in front, leading to the upper stories of the building. There were two doors in the front, the one opening opposite the stairway and the other into the lower room, into which there was also access through a door in the partition. The undertenant A., with the consent of his lessor, removed the partition, agreeing to restore it when requested so to do. Afterwards, A. sold out to the plaintiff S., with whom the defendant agreed in writing that "the present lessee and occupant of the first floor of the house may continue to use and occupy the said premises as long as I hold the lease thereof." In an action brought by S. to re-

have the effect of rendering the words and language of the document certain and manifest, and must leave no doubt as to the correct application of them, and the precise object to which they were intended to refer; for parol evidence is inadmissible to ascertain and establish the intention as an independent fact. The judgment of the court in expounding a deed must be simply declaratory of what is in the deed; it has to ascertain, not what the party intended, as contradistinguished from what the words express, but what is the meaning of the words he has used.[25] And when the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, the instrument is always to be construed according to the strict, plain and common meaning of the words themselves; and evidence *dehors* for the purpose of explaining the instrument according to the surmised intention of the parties is inadmissible. But to explain a patent ambiguity, parol evidence is never admissible, whatever doubt may exist as to the intention of the parties. Thus, if a blank is left in a lease or deed, unless it can be filled from inferences drawn from the instrument itself, it must remain blank, and cannot be cured by extrinsic evidence as the substantive law requires a writing.[26]

It may be shown that the lease was made for the benefit of a person other than the lessor, as, where a lease was made by an administrator in his own name, that it was, in fact, made for the benefit of the estate.[27] So, where no time when the lease shall commence is named therein, it is competent to show what time was fixed upon by parol;[28] or that the lease was in fact executed upon a different day from that named in the lease;[29] or that it has been surrendered;[30] or when the lessee actually took possession.[31] So it is competent to show, by parol, that the landlord knew the pur-

cover damages against C. for putting up the partition, it was held that parol evidence, showing that the plaintiff took the agreement from the defendant with the knowledge of what were the rights and obligations of A., the first undertenant in the premises, was competent. Steffens v. Collins, 6 Bosw. (N. Y.) 223.

[25] 13 Law J. N. S. (Exch.) 365.

[26] Baylis v. Church, 2 Atk. 239; Strode v. Russell, 2 Vern. 624. See, further § .

[27] Russell v. Erwin, 41 Ala. 292

[28] Leggett v. Harding, 10 Ind. 414.

[29] Hall v. Huffman, 32 Mo. 519; Trustees v. Robinson, Wright (Ohio), 436.

[30] Mairs v. Sparks, 5 N. J. L. 513.

[31] Den v. Hamilton, 12 N. J. L. 109.

pose for which the lessee intended to occupy the premises, unless the character of the occupancy is expressly restricted in the lease, or that the lessee knew their condition, or, in the case of a subtenant, that he knew the conditions of the lease under which the original tenant holds.[32] Where in a lease it is stipulated that the lessee "shall have all the personal property," it is proper to show, by parol, whether he was to have it absolutely, or only the use of it.[33]

Customary rights and incidents universally attaching to the subject-matter of the contract in the place and neighborhood where the contract was made, are impliedly annexed to the written language and terms of the contract, unless the custom is particularly and expressly excluded. Parol evidence of custom and usage, consequently, is always admissible to enable us to arrive at the real meaning of the parties who are naturally presumed to have contracted in conformity with the known and established usage. Thus, the custom of the country in regard to the claims of an outgoing tenant of a farm will prevail, although there is a lease under seal regulating the terms of the holding, but not containing stipulations as to the terms of quitting, which can exclude the custom.[34] The customary right of a tenant to the away-going crop, to compensation for work and labor, seed, and materials employed in manuring, tilling, and sowing the land, also the customary right of a landlord or reversioner to a heriot on the death of a tenant for life, and all customs and usages respecting the cultivation of the soil and the mode of husbandry, will impliedly prevail, if the lease is silent respecting them, and parol or oral evidence is, consequently, ad-

[32] In Steffins v. Collins, 6 Bos. (N. Y. Supr. Ct.) 223, the defendant, C., having a lease of a store, underlet to A. the whole of the first floor excepting a portion thereof which was then partitiond off, and which consisted of the stairway, with a hatchway in front, leading to the upper stories of the building. There were two doors in the front, the one opening opposite the stairway and the other into the lower room, into which there was also access through a door in the partition. The undertenant, A., with the consent of his lessor, removed the partition, agreeing to restore it when requested so to do. Afterwards A. sold out to the plaintiff, S., with whom the defendant agreed in writing that "the present lessee and occupant of the first floor of the house may continue to use and occupy the said premises as long as I hold the lease thereof." In an action brought by S. to recover damages against C. for putting up the partition, it was held, that parol evidence, showing that the plaintiff took the agreement from the defendant with the knowledge of what were the rights and obligations of A., the first undertenant in the premises, was competent.

[33] Knapp v. Marlboro, 29 Vt. 282.

[34] Hutton v. Warren, 1 M. & W. 475, 476; Domat, liv. 1 tit. 1.

missible to superadd the usage and customary right to the contract between the parties, such right and usage being recognized by law as incident to the subject-matter of the contract, and consequential upon the taking of the lands.[35] *But parol evidence of custom and usage is not admitted to contradict or vary express stipulations and provisions restricting or enlarging the exercise and enjoyment of the customary right.* Omissions may be supplied by the introduction of the custom, but the custom cannot prevail over and nullify the express provisions and stipulations of the contract.[36] If a lease, for example, contains an express provision as to the disposal of the away-going crop, or specifies and regulates the particular allowances that are to be made by an incoming to an outgoing tenant, the custom in respect thereof is excluded.[37]

An ordinary deed in fee simple may be impressed with a trust by parol evidence, but where the habendum clause gives the grantee authority to dispose of the granted premises as he may see fit, parol evidence of a trust is inadmissible as contradicting the deed.[38] Although a deed by a mortgagor contains full covenants against incumbrances oral evidence is admissible to show that the grantee assumed the mortgage and that the consideration named included the mortgage.[39] A parol agreement by a purchaser of real estate restricting its use in a certain way is not merged in the deed and does not qualify or in any way affect the title to the land and parol evidence of such an agreement is admissible.[40] Where a deed purported to convey real estate and also certain personal property included in a prior agreement the grantee may show that the consideration named in the deed covered also other personal property not mentioned in the prior agreement. Such evidence was held not inconsistent with the deed.[41]

Parol evidence is admissible to show that a mortgage expressed to be for a definite sum, was given to secure future advances.[42] Al-

[35] Wigglesworth v. Dallison, 1 Doug. 201; Wilkins v. Wood, 17 Law J. Q. B. 319.

[36] Clarke v. Roystone, 13 M. & W. 752; 14 Law J. Exch. 143; Taylor on Ev. p. 771; Blackett v. R. Ex. Ass. Co., 2 C. & J. 249.

[37] Roxburghe v. Robertson, 2 Bligh, 156; Webb v. Plummer, 2 B. & Ald. 746; Roberts v. Barker, 1 C. & M. 808.

[38] Mee v. Mee, 113 Tenn. 453, 82 S. W. 830.

[39] Brosseau v. Lowry, 209 Ill. 405, 70 N. E. R. 901.

[40] Hall v. Solomon, 61 Conn. 476, 23 A. 876, 29 Am. St. Rep. 218.

[41] Lathrop v. Humble, 120 Wis. 331, 97 N. W. 905.

[42] Kirby v. Raynes, 138 Ala. 194, 35 So. 118.

though a mortgage is returned to the mortgagor indorsed "paid in full," parol evidence may be received to show that it had not been paid and that the indorsement was the result of a mistake.[43]

Sec. 41. Custom or Usage.

A. Parol Evidence of Usage, admissible when.

Parol evidence applying an instrument to the subject-matter, explaining expressions used in a peculiar sense and showing the circumstances existing when the contract was made, to give effect to the language used in a contract by the parties, as they understood it, is admissible and does not impugn the general rule for the reason that it does not add to or subtract from the contract, but rather enables the court to effectuate it according to the true intention of the parties.[1] It is upon this ground that evidence of a usage or custom existing in a particular trade or business or in a particular locality is permitted to be shown.[2] It is now well settled that a general usage or one which is *known* to the parties and which does not conflict with the express terms of a contract, forms a part thereof as much as though written therein.[3]

The maxim *"In contractibus tacite veniunt ea quae sunt moris et consuetudinis,"* has full application in such cases. "Experience and observation," says STORRS, J.,[4] "prove that the engagements of individuals are in fact entered into with reference to the customs and usages which prevail in the community where they are made; they therefore tacitly agree to conform to them, and so far from doing injustice by regarding such customs and usages, *it is the only mode by which justice can be attained.* The presumption is, indeed, that those who enter into contracts, intend to be governed by

[43] Barden v. Cunningham, 136 Ala. 263, 34 So. 26.

[1] Boonnan v. Jackson, 12 Wend. (N. Y.) 573; Robertson v. French, 4 East, 135.

[2] The Schooner Reeside, 2 Sum. (U. S.) 569; Heald v. Cooper, 8 Me. 83; Wait v. Fairbanks, Brayt. (Vt.) 7; William v. Gilman, 3 Me. 276.

[3] Sipperley v. Steward, 50 Barb. (N. Y.) 62; Wheeler v. Newbold, 5 Duer (N. Y.), 29; Bank of Columbia v. Fitzhugh, 1 H. & G. (Md.) 239; Duguid v. Edwards, 50 Barb. (N. Y.) 288; United States v. Arrand, 6 Pet. (U. S.) 715; Martin v. Maynard, 16 N. H. 165; Sewall v. Gibbs, 1 Hall (N. Y.), 612; Sampson v. Gazzam, 6 Port. (Ala.) 123; Stultz v. Dickey, 5 Binn. (Penn.) 287; Mann v. Burch, 25 Ill. 35; Palmer v. Kane, 5 Wis. 265; Ludwick v. Ohio Ins. Co., 5 Ohio, 436; Haven v. Wentworth, 2 N. H. 93; Stevens v. Reeves, 9 Pick. (Mass.) 198; Inglebright v. Hammond, 19 Ohio, 337; Noble v. Kenoway, 1 Doug. 510; Parr v. Anderson, 6 East, 202; Halsey v. Brown, 3 Day (Conn.), 346.

[4] In Kilgore v. Bulkley, 14 Conn. 390.

the general principles of law. It is, however, competent for them to renounce these principles when public policy does not forbid, and to adopt another rule of action, and the prevalence of a particular local usage on the subject, variant from those general rules, in the absence of evidence to resist it, affords a rational ground of inference that *they intended to do so.*" The injustice of a contrary doctrine may be illustrated thus: Suppose the statute provides, as is the case in many of the States, that a "barrel" shall consist of thirty-two gallons, but by the uniform *usage* of a certain trade a barrel consists of *forty-four* gallons, as in the petroleum trade, and that number of gallons *in that trade* has uniformly been given for a barrel, have not parties contracting for a *barrel* of petroleum a right to understand that they are to have forty-four gallons, precisely the same as though it had been written out in the contract, and notwithstanding the statute fixes the general standard at a less number? The courts justly answer in the affirmative,[5] and the same principle lies at the foundation of all the cases admitting this species of evidence. Its object and purpose is, not to permit the contract, which has been reduced to writing, to be varied in any respect, but rather to ascertain what the parties intended by their writing, and carry their intention into effect. Where a contract is entered into, the parties are presumed to deal with reference to the known general or uniform custom or usage governing the business or subject-matter to which the contract relates, unless they exclude such presumption by the terms of the agreement itself; but, to have commercial usage take the place of general law, it must have been so uniformly acquiesced in for such a length of time that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract.[6]

[5] Miller v. Stevens, 100 Mass. 518. See Evans v. Myers, 25 Penn. St. 114; Green v. Moffat, 22 Mo. 529, where it was held that a usage to regard 2,200 pounds as a ton instead of 2,000 pounds, as fixed by statute, is not admissible. But an examination of those cases will show that the real ground for rejecting such evidence was that it did not establish a usage which would warrant a presumption that the parties contracted in reference to it.

[6] Oldeshaw v. Knoles, 4 Ill. App. 63; Wheeler v. Newbald, 5 Duer (N. Y.), 29; Juggomohun Ghore v. Munickchund, 7 Moore Ind. App. 263; Wilcox v. Phillips, 1 Wall., Jr. (U. S. C. C.) 47; Leigh v. Hewitt, 4 East, 154; Dalby v. Hirst, 1 B. & B. 224; Grissell v. Bristowe, L. R. 46, P. 36; Greanes v. Legg, 2 H. & N. 210; Duncan v. Hell, L. R., 6 Exch. 25; Bayliffe v. Butterworth, 1 Exch. 429; Hodkinson v. Kelly, L. R., 6 Exch. 25; Taylor v. Stray,

The contract expresses what is particular to the bargain, and the usage supplies the rest.[7]

B. Qualities and Proof of binding Usage.

It follows, therefore, that, in order to amount to a binding usage of a trade or business, so to speak, it must be shown to be so well established, so general, so uniform and notorious that it may reasonably be presumed that the parties knew of and contracted in reference to it. Mercantile usage must be proved *by the multiplication or aggregation of a great number of instances* showing a certain course of business, and a general, established understanding respecting it.[8] And it must be shown that it is *established* and not merely casual, *uniform* and not varying, *general* and not personal, *or that it was known to the parties when the contract was entered into.*[9] Where a custom is shown to prevail generally and not to be purely local in nature and is so well settled and notorious as to raise a presumption that it was known to a buyer and seller this presumption is not rebutted by testimony of one of the parties that he was not aware of such custom.[10] In a suit on an insurance policy it is not competent for the plaintiff to show a custom and usage of other companies doing business in the vicinity to waive proofs of loss as provided in the policy although evidence would be admissible to show a usage of the defendant company to waive such proof.[11] If such usage is not proved, it should be laid out of

2 C. B., N. S. 175; Bayly v. Wilkins, 7 C. B. 880; Buckle v. Knapp, 36 L. J. Exch. 49; Pollock v. Staples, 12 Q. B. 765.

[7] Myer v. Dresser, 16 C. B., N. S. 646; Dalton v. Daniels, 2 Hilt. (N. Y. C. P.) 463.

[8] Foye v. Leighton, 22 N. H. 71; Knowles v. Dow, 22 id. 387; Burr v. Sickles, 17 Ark. 428; Walker v. Barrow, 6 Minn. 508; Saint v. Smith, 1 Coldw. (Tenn.) 51; Chesapeake Bank v. Swain, 29 Md. 483; Smith v. Floyd, 18 Barb. (N. Y.) 392; Mackenzie v. Dunlop, 3 Macq. (Sc.) H. L. Cas. 22.

[9] Wheeler v. Newbould, 5 Duer (N. Y.), 29; Sipperley v. Steward, 50 Barb. (N. Y.) 62; Martin v. Maynard, 16 N. H. 165; Duguid v. Edwards, 50 Barb. (N. Y.) 288; Wood v. Hicock, 2 Wend. (N. Y.) 501; Kendall v. Russell, 5 Dana (Ky.), 501; Stevens v. Reeves, 9 Pick. (Mass.) 198; Watt v. Hock, 25 Penn. St. 411; Hursh v. North, 40 id. 241; Sampson v. Gazzam, 6 Port. (Ala.) 123; Haven v. Wentworth, 2 N. H. 93; Gallup v. Lederer, 1 Hun (N. Y.), 282; Mills v. Hallock, 2 Edw. Ch. (N. Y.) 652.

[10] Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

[11] Phenix Insurance Co. v. Munger, 49 Kan. 178, 33 Am. St. Rep. 360, 30 P. 120.

Where a custom or usage was set up that a class of mercantile houses in the same line of trade in New York, generally known as "six months' houses," by their general

the case; and an offer of evidence of anything less should be excluded.[12] But in order to establish it neither antiquity nor that general notoriety essential to establish a custom need be shown. It is sufficient if it is shown to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient imported into the contract by the parties.[13] And this is the case only when the usage is certain, reasonable and universally acquiesced in, so that every one engaged in the trade knows, or might have known of it, if he had taken the trouble to inquire.[14] If it is sought to establish a usage of a trade to control the meaning of words, it must be shown that the words are used in that trade and are understood in a defined sense, and a mere habit of affixing a special meaning to words when used in one class of contracts does not amount to such a usage as will justify the presumption that they were used in that sense in the contract in question. The proofs must go further, and show facts that lead to a conviction that they were used in that case in such sense.[15]

As previously stated, the usage must be proved by the multiplication or aggregation of a great number of particular instances; *but these instances must not be miscellaneous in character, but must have a principle of unity running through their variety, and that unity must show a certain course of business, and an established understanding respecting it.* A usage of trade is a matter of fact, and must be proved like any other fact, and cannot be established by the mere opinion of witnesses. It may be proved by witnesses testifying to its existence and uniformity from their knowledge of it obtained by observation of what is practiced by

and uniform course of business, on a bill of goods containing a memorandum, "six per cent. off for cash," would understand a sale on six months' credit, without any express agreement, it was held that in order to discharge the office of exposition, and be admissible in evidence, it must be found to be the general usage of the whole of that class of houses in the city of New York, and so well established and uniformly acquiesced in, and for such a length of time, that the jury might fairly infer that it was known to the contracting parties, and made by implication a part of their contract.

[12] Linsley v. Lovely, 26 Vt. 123.

[13] Shackleford v. New Orleans R. R. Co., 37 Miss. 202; Harper v. Pound, 10 Ind. 32; Buck v. Grimshaw, 1 Edw. Ch. (N. Y.) 147; Chastain v. Bowman, 1 Hill (S. C.), 276; Collings v. Hope, 3 Wash. (Va.) 150; Juggomohun Ghore v. Manickchund, 7 Moore Ind. App. 263; Smith v. Gibbs, 44 N. H. 335; Rapp v. Palmer, 3 Watts (Penn.), 178; Lewis v. Thatcher, 15 Mass. 433.

[14] Plain v. Allcock, 4 F. & F. 1074.

[15] Abbott v. Bates, 43 L. J. C. P. 150; Eaton v. Smith, 20 Pick. (Mass.) 150; Steward v. Scudder, 29 N. Y. L. 96.

themselves *and others* in the trade to which it relates, but the *opinions* of witnesses, or their conclusions or references as to its effect, either upon the contract or the legal title or rights of parties, are not competent to show the force of such usage or its character.[16] As a general rule, one witness is not sufficient to establish a general usage;[17] but the question as to whether the evidence of one witness is sufficient or not, must be determined from the witness's means of information and acquaintance with the business.[18] While, as previously stated, usage cannot be established by the mere opinions of witnesses, yet, if the witness has derived all his knowledge of the usage from his own business, and it is shown to be sufficiently extensive and long continued to warrant the presumption that his knowledge in that respect is general, he may state his belief as to what such custom or usage is.[19]

[16] The testimony of a single witness is not generally sufficient to establish a usage of trade of which all are bound to take notice. Wood v. Hicock, 2 Wend. (N. Y.) 501. But if the witness discloses such familiarity with the trade as to satisfy the jury, the evidence may be sufficient. Jones v. Hoey, 128 Mass. 585; Penland v. Ingle (N. C., 1905), 50 S. E. 850; Robinson v. United States, 13 Wall. (U. S.) 366; Partridge v. Forsyth, 29 Ala. 200; Vail v. Rice, 5 N. Y. 155. Nor is the custom of a particular house of itself sufficient proof of a general usage. Weber v. Kingsland, 8 Bos. (N. Y.) 415. In Smith v. Floyd, 18 Barb. (N. Y.) 523, it was held that the evidence to establish a customary right should not be less than that required to establish a prescriptive right. In Jewell v. Carter, 25 Ala. 498, it was held that where there is conflicting evidence, the question as to whether or not a usage is established should be left to the jury, and that where there is the evidence of only one witness thereto, the court should tell the jury that there is no evidence of a usage before them. See also Boardman v. Spooner, 13 Allen (Mass.), 359. But this is not the rule now generally recognized, and if a witness testifies fully and explicitly to the existence of a usage, and his testimony is not contradicted, it cannot be assumed as a legal conclusion that the proof is insufficient. Martin v. Mobile Bank, 10 Ala. 284; Robinson v. United States, 13 Wall. (U. S.) 366; Hasdins v. Warren, 115 Mass. 514; Garey v. Meaghar, 33 Ala. 630; Chesapeake Bank v. Swain, 29 Md. 483.

[17] Halverson v. Cole, 1 Spears (S. C.) 321; Thomas v. Graves, 1 Mill (S. C.) Const. 309; Bissell v. Ryan, 23 Ill. 566; Wood v. Hickok, 2 Wend. (N. Y.) 501; Halls v. Howell, Harp. (S. C.) 427.

[18] Hamilton v. Nickerson, 13 Allen (Mass.), 351; Vail v. Rice, 5 N. Y. 155; Partridge v. Forsyth, 29 Ala. 200; Robinson v. United States, 13 Wall. (U. S.) 365.

[19] Hamilton v. Nickerson, 13 Allen (Mass.), 351.

Proof that in one instance the use by a son of his father's name, upon negotiable paper discounted at a bank, was known and acquiesced in by the father, does not authorize the introduction in evidence of subsequent similar acts, for the purpose of showing an implied authority in the son to sign his father's name, without proof that these also were known and acquiesced in by him. Greenfield Bank v. Crafts, 2 Allen (Mass.), 269. Evidence of a custom of manufacturers of iron castings to warrant the quality of the articles

A usage governing a question of legal right cannot be proved by isolated instances, but should be so certain, uniform and notorious that it must probably have been understood by the parties as entering into the contract.[20]

An isolated instance is not sufficient to prove a custom, nor will evidence of the custom of one person be sufficient to establish a gen-

made by them, without an express contract to that effect, is admissible in an action founded on such supposed warranty. Evidence that such was the custom at three different establishments, without proof that a contrary usage obtained at others in the vicinity, is sufficient to authorize the jury to find such to be the general custom. Sumner v. Tyson, 20 N. H. 384. To prove a custom for all the inhabitants of Hampton to deposit sea-weed upon the close of the plaintiffs, the defendant offered evidence that thirty of the inhabitants had done so for many years. It was held that this was competent evidence to be submitted to the jury to prove the custom. So, where a plea alleged a custom in the inhabitants of Hampton to haul sea-weed upon the plaintiff's close, the evidence was that only those inhabitants of Hampton exercised the right who lived at a convenient distance from the seashore, it was held that this was competent evidence of the custom. Knowles v. Dow, 22 N. H. 71.

[20] Cope v. Dodd, 13 Penn. St. 33; The Paragon, 1 Ware (U. S.), 322; Desha v. Holland, 12 Ala. 513.

Where the fact is material that a purchaser of land has actual knowledge of a right of way over the same, evidence that the way was used for many years, and that the purchaser lived all the time in the same immediate neighborhood, is properly submitted to the jury. Wissler v. Hershey, 23 Penn. St. 333. The fact that it is shown that a certain method of doing business is "very common," does not establish a usage. Ansil v. Crawford, 7 Ala. 335. To establish a shipping usage on a certain river, the witness may state his habit and custom in shipping on all boats on the river. Berry v. Cooper, 28 Ga. 543. Proof of the usage of the clerks of steamboats to receive and carry packages from one port to another, without hire, in the expectation that such boat would be preferred by the parties in their shipments of freight, is insufficient to bind the owners; first, because no certain or fixed standard of remuneration is shown, nor that the consignee of the package would be liable to make any return for the risk and labor incurred; and, second, because it is not shown that such usage had grown up with the consent of the owners of vessels, or that it was more than a mere accommodation usage. Cincinnati, &c., Co. v. Boal, 15 Ind. 345. Where the plaintiff relied upon a parol acceptance of a bill of exchange, evidence of a custom of the defendants to accept always in writing and make corresponding entries on their books, was held competent as tending to show in this case that the bill had not been accepted. Smith v. Clark, 12 Ia. 32. Where there is proof of an agreed price or compensation, or of a usage which might affect it, or from which an agreement might be inferred, it would not be correct to authorize them to judge of the reasonableness of the charges, irrespective of such agreement or usage; but the court should determine whether, if proved to the satisfaction of the jury, the usage is reasonable or operative. Codman v. Armstrong, 28 Me. 91. The mere opinions of witnesses are not evidence of a usage. Garey v. Meagher, 33 Ala. 630. That a railroad company had been for about a month in the habit of storing cotton consigned to their agent, at the warehouse of A., without any proof that this was generally known, or any other evidence that the shipper had notice of it, is not sufficient to bind him. Alabama, &c., R. R. Co. v. Kidd, 35 Ala. 209.

eral course of trade.[21] When a special custom at the place of shipment is proved, and the question is whether the purchaser had knowledge of the special custom, and contracted in reference to it, the previous course of dealing between the same parties—such as the order, shipment and receipt of several invoices of goods, without any charge for insurance—is sufficient evidence from which the jury may infer knowledge of the special custom.[22] A general usage in any place, by which sales on commission are regulated, may be given in evidence, for it is a reasonable and legal presumption that every man knows the usage of the place in which he traffics, whether by himself or his factor, and, if the usage is not illegal, he is bound by it.[23] A usage may be proved by parol, whether it originates in a public written law, or not.[24]

[21] Burr v. Sickles, 17 Ark. 428.

[22] Walsh v. Frank, 19 Ark. 270.

Evidence that "there has always been a custom at a certain saw-mill and other mills in the neighborhood to leave the slabs as belonging to the mill, the owners of the logs never claiming them," does not establish a legal right in the mill as real estate to the slabs sawed. Adams v. Morse, 51 Me. 496. Proof is admissible of a custom among merchants, where merchandise is sold on condition, to deliver it to the buyer before compliance with the condition, and that such change of custody is not *de facto* a waiver of the condition, and the property does not pass thereby. Farlow v. Ellis, 15 Gray (Mass.), 229. When, in a suit against a railroad company for an injury received while passing along a highway, an issue is made upon the unreasonable or negligent conduct of the company in the use of the highway at the time complained of, its usage at other times has no legitimate bearing upon this issue, and evidence respecting such usage is incompetent. Gahagan v. Boston, &c., R. R. Co., 1 Allen (Mass.), 187. No exception lies to the admission of evidence of a custom existing in a trade without direct evidence that it was known to the opposite party, if the party offering it contends that he can prove, from all the evidence in the case, that it must have been known to him, and that question is argued and submitted to the jury under proper instructions in matter of law. Dodge v. Favor, 15 Gray (Mass.), 82. In determining whether a salary or compensation paid to a director of a bridge corporation was a reasonable expense of the corporation, evidence is inadmissible of a custom in sundry other corporations to pay directors no salaries as compensation for services. Central Corp. v. Lowell, 15 Gray (Mass.), 106.

[23] Dwight v. Whitney, 15 Pick. (Mass.) 179; Goodenow v. Tyler, 7 Mass. 36, 46.

Goods being consigned to an agent for sale, with general instructions to remit the proceeds, it is a sufficient compliance with such instructions it the agent remits by a bill of exchange, without indorsing or guaranteeing it, provided such is the usage at the agent's place of business, and the agent uses proper diligence and discretion in the purchase of the bill. In an action against the agent, to recover the proceeds of such a sale, proof of the usage and of a remittance accordingly is a sufficient *prima facie* defense, and if it is established by the agent, the burden of proof is then on the principal to show that bills remitted in pursuance of the usage ought to be indorsed or guaranteed by the agent. Potter v. Morland, 3 Cush. (Mass.) 384.

[24] Drake v. Hudson, 7 H. & J. (Md.) 399; see, also, Livingston v.

C. Need not necessarily be General.

It is not necessary that a usage should be *general*, that is, extend over the whole country, as a mere private usage, that is, a usage of a particular business house or individual in a certain department of business, may be binding, *if it is shown that the parties knew of it* at the time when the contract was entered into,[25] or knowledge of it in some way is brought home to them, so as to raise a presumption that they contracted in reference to it. A trade custom is admissible in evidence to explain the meaning of a contract concerning that trade, and need not be coextensive with the state. Even the usage of a particular firm may govern a contract if known to the others contracting.[26] Where a fire insurance policy provides insurance on "such other merchandise as is usually kept for sale in a retail hardware store" it is not necessary to show a custom to keep dynamite in such a store throughout the state. It is sufficient that it is generally recognized and observed by those engaged in the kind of transactions to which it applies within the region where it is claimed to exist, and it is not essential that it be observed in every individual transaction.[27] Neither is its antiquity of any importance except as in aid of the main point, which is, to show that the parties knew of the usage and intended to adopt

Maryland Ins. Co., 7 Cranch. (U. S.) 506.

In an action for damages for the want of correspondence between tobacco bought by sample and the samples by which it was sold, evidence showing a custom of dealers in Baltimore of buying and selling in bulk, by samples prepared by the State inspectors, without insuring correspondence in quality, is admissible. Gunther v. Atwell, 19 Md. 157.

[25] Wood v. Hicock, 2 Wend. (N. Y.) 501; Gahay v. Lloyd, 3 B. & C. 793.

[26] Rostetter v. Reynolds, 160 Ind. 133, 66 N. E. R. 612. Custom to measure lumber at time of sawing and not allow for subsequent shrinkage.

[27] Traders' Ins. Co. v. Dobbins & Ewing (Tenn., 1905), 86 S. W. 383.

Under this rule it has been held that the custom of banks in reference to a demand of payment, etc., might be shown, although not according to the rules of the common law. Renner v. Bank of Columbia, 9 Wheat. (U. S.) 581; Bank of Columbia v. Magruder, 6 H. & J. (Md.) 172; Kennebeck Bank v. Page, 9 Mass. 155; Loring v. Gurney, 5 Pick. (Mass.) 16; Leavitt v. Simes, 3 N. H. 14; Weed v. Gorham, 10 Mass. 366; Bank of Utica v. Smith, 18 John. (N. Y.) 230; Emanuel v. Robarts, 9 B. & S. 121.

But a custom of insurance men in one city of the State is not admissible to explain the meaning of the term "net receipts" in a State statute as the custom was confined to one city and the statute applies to the entire State, and its construction is a question of law for the court. National Fire Ins. Co. v. Hanberg (Ill., 1905), 74 N. E. 377.

it as the law of their contract.[28] With reference to the evidence necessary to support an alleged usage, it may be said that it is not necessary to show either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. A usage to be good and to be one of which the court will take judicial notice must be general and of such long standing as to have become a part of the law itself; so in Arkansas, in 1896, it was held that a usage as to the authority of officers of street railway corporations could not be binding as electric street railways in the state were of comparatively recent date and did not exist to any general extent throughout the state.[29]

A custom may be valid although confined to a certain district. Thus a universal custom to recognize the rights of a prior appropriator of water for mining and other beneficial uses in a certain district may be judicially recognized by the courts.[30] On the issue of the reasonable use of water evidence of the custom or habit of other users upon the same stream is admissible. [31]

Where it is attempted to engraft on a contract some usage of a particular trade or local custom, the opposite party is at liberty to disprove the usage or custom by the like evidence, and for that purpose to show other previous transactions in like cases between the same parties wherein the supposed usage or custom was not acted on.[32]

If the usage exists, and it is not inconsistent with the written contract, it is precisely the same as if it were written in words attached to the contract, and it cannot be got rid of by proof of an oral agreement to waive or vary it.[33]

The words "*usage* of trade" are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from the general custom of merchants, which is the universal established law of the land, which is to be collected from

[28] Kendall v. Russell, 5 Dana (Ky.), 503; Thompson v. Hamilton, 12 Pick. (Mass.) 425.

[29] City, etc., Ry. Co. v. First National Exchange Bank, 62 Ark. 33, 34 S. W. 89, 54 Am. St. Rep. 282.

[30] Isaacs v. Barber, 10 Wash. 124 38 P.. 871, 45 Am. St. Rep. 772. But see Clark v. Allaman (Kan., 1905), 80 Pac. 571, where such a custom was held invalid as unreasonable.

[31] Hazard Powder Co. v. Somersville Mfg. Co. (Conn., 1905), 61 A. 519.

[32] Bourne v. Gatliffe, 3 M. & G. 643.

[33] Fawkes v. Lamb, 31 L. J., Q. B. 98. See, also, Burgess v. Wickham, 3 B. & S. 669; Clapham v. Langton, 5 B. & S. 729.

decisions, legal principles and analogies, not from evidence *in pais*, and the knowledge of which resides in the breast of the judge.[34] In these cases evidence of a general custom was not admitted to contradict the law merchant.[35] On the question of the authority of the defendant to make a contract giving to a jobber the exclusive right to sell in a certain district evidence of a custom among such agents to make such contract is admissible.[36] Evidence is admissible of the general custom or usage to the effect that persons authorized by mutual fire insurance companies in Massachusetts to solicit insurance can bind the company until notice of the refusal of the risk by the company is communicated to the person desiring the insurance. This custom is binding even though the defendant has private instructions limiting his power.[37] Where a course of dealing by officers and agents of a corporation at variance with the strict limitation of duty had been established by usage that had been allowed to accumulate in the transaction of its business and the acquiescence of its managers charged with the duty and control of the company's business the company may be bound thereby. But isolated incidents are insufficient to prove the custom and cannot be shown to overcome or change the express provisions of a contract.[38]

[34] 1 Smith, L. Cases, 7th ed., p. 610; Suse v. Pompe, 8 C. B., N. S. 538; 30 L. J., C. P. 75; Meyer v. Dresser, 16 C. B., N. S. 646.

[35] In Kidston v. Empire Marine Insurance Co., L. R., 1 C. P. 535; L. R., 2 C. P. 357, in an action on a policy of marine insurance, it was held that evidence that expenses incurred in preserving the subject-matter of insurance were not "particular average," but were "particular charges," as those terms were understood in the business of marine insurance, was admissible to show the mode in which such expenses were treated by mercantile men; but that the usage proved by it was in affirmance of the common law, and did not control or vary the language of the policy.

[36] Kaufman Bros. & Co. v. Farley Manf. Co., 78 Iowa, 679, 43 N. W. 612, 16 Am. St. Rep. 462.

[37] Brown v. Franklin Mutual Fire Insurance Co., 165 Mass. 565, 43 N. E. 512, 52 Am. St. Rep. 534.

[38] Kocher v. Supreme Council, 65 N. J. L. 649, 48 A. 544, 86 Am. St. Rep. 687.

As where a policy of insurance was "on the ship till moored at anchor 24 hours, and on the goods till discharged and safely landed," evidence of a usage that the risk on the goods as well as the ship, expired in 24 hours, was held inadmissible to qualify the unequivocal words of the policy. Parkinson v. Collier, Park Ins., 6th ed. 416. So a contract for payment in money cannot be explained to mean payment *in goods;* but it may be shown that goods were in fact accepted as cash in the particular transaction. Smith v. Battams, 26 L. J., Ex. 232. So where goods are sold under a memorandum to be paid for by bill, oral evidence is inadmissible to show that bill means *approved* bill. Hodgson v. Davies, 2 Camp. 530. So in an action on warranty of "prime singed bacon," oral evidence was rejected of a practice in the bacon trade to re-

But proof of the usage of trade is not admissible to contradict the plain words of an instrument not used in a technical sense. Oral evidence of what the *parties* meant by a provision in the sale of a cargo, that "14 days are to be allowed for delivery," was not admitted; but if evidence of a *general usage* explaining those words had been offered, it would perhaps have been admissible.[39] In a contract for the sale of tallow by defendant in the name of a broker who was his own representative, the defendant was not allowed to show a custom of trade upon such a contract to look to the broker for its completion.[40] But usage of trade is admissible to show that the broker is personally liable on a contract of sale on behalf of an undisclosed principal.[41] The evidence of such usages may be confirmed by evidence of a similar custom in a similar trade in the same place, *e. g.*, in the colonial market, to corroborate the usage in the fruit market.[42] So by evidence of a similar custom in the same trade at a neighboring place.[43] Where a charter party was signed by the defendants, "as agents for merchants," evidence of a custom was admitted to show that the defendants were liable on the charter party as principals, if their principal's name was not disclosed within a reasonable time.[44]

ceive bacon in some degree tainted as "prime singed bacon." Yates v. Pym, 6 Taunt. 446. So oral evidence is not admissible to explain the meaning of the words "more or less" in a mercantile contract. Cross v. Elgin, 2 B. & Ad. 106; or to show that "cargo" and "freight" apply to passengers as well as goods. Lewis v Marshall, 7 M. & G. 729; or to show that boats on the outside of a ship, slung upon the quarter, are not protected by a marine policy in the usual form on the ship and furniture, Blackett v. R. Exchange Assur. Co., 2 C. & J. 244; or to show a custom within the port of London that the insurers of jettisoned goods are only liable for the share of the loss cast upon the owner of jettisoned goods in the general average statement, Dickenson v. Jardine, L. R., 3 C. P. 639; or to show that a contract to sell "ware potatoes" means a certain sort of "ware potatoes," Smith v. Jeffryes, 15 M. & W. 561; or that on a contract to sell wool "to be paid for by cash in one month, less 5 per cent. discount," the vendor has a lien on it for payment by usage of the trade. Spartali v. Benecke, 10 C. B. 212; 19 L. J., C. P. 293; Godts v. Rose, 25 L. J., C. P. 61. The case of Spartali v. Benecke, *supra*, was a good deal observed upon by the Ex. Ch. in Field v. Lelean, 6 H. & N. 627; 30 L. J., Ex. 170, *ante*, p. 24; but the difference of opinion is not as to the principle, but as to the meaning of the contract and the effect of the custom. See, also, Phillips v. Briard, 1 H. & N. 21; 52 L. J., Ex. 233.

[39] Sotilichos v. Kemp, 3 Exch. 105.

[40] Trueman v. Loder, 11 Ad. & E. 589.

[41] Humfrey v. Dale, 7 E. & B. 266; see, also, Cropper v. Cook, L. R., 3 C. P. 194, 199.

[42] Fleet v. Murton, L. R., 7 Q. B. 126.

[43] Plaice v. Allcock, 4 F. & F. 1074.

[44] Hutchinson v. Tatham, L. R., 8 C. P. 482.

D. Must be Established by Instance of its Application.

A witness, if asked whether a certain usage exists in a particular trade, who answers yes, but is unable to give instances in which to his knowledge it had been acted upon, proves nothing.[45] It is not sufficient to show by a witness belonging to a particular trade, that he does a certain thing in a particular way, but it must also be shown that that is the usual mode adopted in the trade.[46] The course adopted by the trade should be shown,[47] and evidence of an isolated instance is insufficient.[48] Isolated instances are insufficient to establish a custom, as for instance, to prove a custom of a railroad to give clearance cards to employees on their leaving the service of the company.[49] But the belief of a witness in the existence of a business usage, as derived from a knowledge of the business for a long series of years, is competent to prove such usage, and it is immaterial that the knowledge is derived wholly from his own business, if that is sufficiently extensive to enable him to testify to the fact of usage.[50] It is not necessary that the witness should be engaged in a particular trade or business to make him competent to testify to a usage pertaining to it. It is sufficient if he has acquired his knowledge by dealing with those engaged in it.[51] Thus, in the case last cited, it was held that the customary mode of banks in respect to certain matters may be proved by a person who has dealt with, but never employed by them. So the usual mode of transferring notes, drafts, etc., may be proved by a witness who has derived a knowledge thereof in any manner that enables him to testify to the facts.[52] In order to establish the existence of a general usage among banks, or, indeed, in any business,

[45] Hall v. Benson, 7 C. & P. 911; Cunningham v. Fonblanque, 6 C. & P. 44; Geary & Meagher, 33 Ala. 630.

[46] Pfiel v. Kemper, 3 Wis. 315. In this case it was sought to fix the value of professional services by usage, and it was held not competent to ask a witness what he should have charged for the same services; but that the evidence must be either to the value of the services or the customary rate of compensation.

[47] Ruan v. Gardner, 1 Wash. 145; Winthrop v. Ins. Co., 2 id. 7; Austin v. Williams, 2 Ohio, 64. Proof that a particular mode of selling cotton in Mobile "is very common," but that a few factors at that place would not do so, was held insufficient to establish a usage of trade. Anstill v. Crawford, 7 Ala. 335.

[48] Burr v. Sickle, 17 Ark. 428; Greenfield Bank v. Crafts, 2 Allen (Mass.), 269.

[49] Cleveland, etc., Ry. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296.

[50] Hamilton v. Nickerson, 13 Allen (Mass.), 351.

[51] Grippin v. Rice, 1 Hilt. (N. Y. C. P.) 184.

[52] Commercial Bank of Pennsylvania v. Union Bank of New York, 19 Barb. (N. Y.) 392.

the facts must be shown; that is, the witness must state what is done, how, and not merely his opinion deduced from the manner of dealing in a few instances in particular banks.[53] The mere opinion of witnesses that, in certain transactions with an agent, it is customary to hold him responsible, is not such evidence of a custom in that respect as will exonerate the principal.[54] Evidence that certain persons understood that the term "minerals" was not to include granite but ores containing metals is insufficient to establish a settled and recognized usage to override the legal meaning of the word. A custom must be collected "not from what witnesses say they think the custom is but from what was publically done throughout the district."[55] A usage may be proved by parol, whether it arises from a public written law or not,[56] and the question as to whether or not it can be established by the evidence of one witness, depends upon the extent of his experience and knowledge in that regard. But if one witness swears to the existence of a certain usage, and another equally competent and conversant with the trade or business to which it relates, the existence of the usage is not established, especially where other witnesses could be but are not called.[57] But, generally, when the evidence is conflicting, it should be submitted to the jury to determine whether the usage is established or not. But where there is only the evidence of one witness, and his testimony is not restricted to any particular time or place, and tends to establish a usage in conflict with the law or other well recognized usages, it is proper for the court to tell the jury not to regard it.[58]

E. General Usage, how established. By one Witness.

A general usage in a particular place, regulating certain matters, as sales on commission, may always be shown when the usage is

[53] Chesapeake Bank v. Swain, 29 Md. 483.

[54] Geary v. Meagher, 33 Ala. 630.

[55] Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683.

[56] Drake v. Hudson, 7 H. & J. (Md.) 399; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506. But where it is sought to prove a usage as an incident of a written contract, the contract itself should be first produced, and then any incident to it arising from usage can be proved by parol, but incidents cannot be proved first to establish the existence of the contract, as to prove a custom of a place by which all notes expire at a certain time. Moore v. Eason, 11 Ired. (N. C.) L. 568.

[57] Parrott v. Thacher, 9 Pick. (Mass.), 426.

[58] Jewell v. Centre, 25 Ala. 498.

reasonable and not contrary to law, and it will be presumed that every one dealing where such usage prevails, knows of and deals in reference to it,[59] and if the usage is not so general as to uphold such a presumption, his knowledge thereof may be shown by the previous course of dealing between the parties, and this furnishes sufficient evidence from which the jury may infer knowledge of the usage.[60] A custom in order to change the rights and liabilities of persons arising from their dealings with each other must be certain in form and either known to the party sought to be charged thereby, or so general and notorious that knowledge and adoption of it may be presumed.[61]

As a general rule, a custom cannot be established from the testimony of one witness.[62] Especially is this the case when the custom sought to be established is one in favor of a certain town or locality. Thus, in a case where it was sought to establish a custom for all the inhabitants of a certain town to deposit sea-weed upon the plaintiff's land, it was held that thirty inhabitants having testified that they had done so for many years, it was competent evidence from which the jury might find the custom.[63] In all cases, in order to establish a customary right, the evidence should not be less than that required to establish a prescriptive right.[64] The burden of proving either a custom or usage of trade devolves upon the party seeking the benefit of it,[65] and must be shown by facts rather than the belief or opinion of witnesses. Thus for a witness to state that a custom or usage exists, without stating instances where it has been acted upon or applied, proves nothing, because

[59] Dwight v. Whitney, 15 Pick. (Mass.) 179; Goodnow v. Tyler, 7 Mass. 36.

[60] Walsh v. Frank, 19 Ark. 270.

[61] Russell's Extx. v. Ferguson (Vt., 1905), 60 A. 802, where certain evidence was held insufficient to prove a binding custom making attorneys liable to a justice for fees in cases entered by the attorneys. Evidence as to a custom of elevatormen was held incompetent without proof that the custom was known to both parties or was so notorious as to furnish a presumption of knowledge, in McSherry v. Blanchfield, 68 Kan. 310, 75 Pac. 121.

[62] Vait v. Rice, 5 N. Y. 150; Thomas v. Graves, 1 Mill (S. C.) Const. 309; Wood v. Hicock, 2 Wend. (N. Y.) 501; Bissell v. Ryan, 22 Ill. 566; Partridge v. Forsyth, 29 Ala. 200.

[63] Knowles v. Dow, 22 N. H. 387. In Hanmer v. Chace, 4 DeG. J. & S. 620, it was held that a custom of a manor might be proved by one instance, and in a suit by the lord to restrain a copyholder from digging vitreous sand on his own tenement, evidence of a custom to dig it for twenty-seven years, and of a custom to dig sand generally, was sufficient to establish the custom.

[64] Smith v. Floyd, 18 Barb. (N. Y.) 523.

[65] Caldecott v. Smythies, 7 C. & P. 808.

the whole matter rests in his opinion or belief, but if he can speak from instances in which it has been acted upon, facts are then presented from which the jury can arrive at a conclusion.[66] While a custom or a usage, at a place distant from that in which it is sought to apply it, may be shown as tending to establish such custom or usage at the place where it is sought to give it effect, yet it has no such tendency unless instances, in which it has been acted upon, are shown at such place.[67] But proof of a single instance at the place in question may be sufficient, unless the effect of such evidence is antagonized by proof of similar transactions in similar establishments in which it was not acted upon.[68] To establish a custom of shippers on a certain river, it is competent for a witness to state his practice in that respect on all boats on the river.[69] The fact that a person whom it is sought to affect by a local custom or usage, lives at a great distance from the place where the custom, etc., exists, does not, if the transaction had its *situs* at such place, tend to overcome the presumption that he knew of the custom and contracts in reference to it, as it is regarded as reasonable to presume that a person knows the custom and usages of a place at which he traffics, wherever he may reside.[70] In order to establish a usage of a certain trade or business, the testimony should come from those engaged in the business, or those who are familiar with the existence and application of the usage, but the testimony of a single witness, who testifies that he knew what had been the custom of his neighbors for several years, in relation to certain matters—as in the case cited below, the manner in which farmers receive their supplies from merchants who advanced to them—is not sufficient to establish a usage.[71]

An occasional practice tolerated to a certain extent in a certain department of business for any given year, cannot be said to be made out, without distinct proof of some specific instances during

[66] Henderson v. Charnock, Peake, 4.

[67] Brown v. Wilkinson, Co. Lit. 270*b*; Milward v. Hilbert, 3 Q. B. 120.

[68] Citizens' Ins. Co. v. McLaughlin, 53 Penn. St. 485; Sumner v. Lyton, 20 N. H. 384.

[69] Berry v. Cooper, 28 Ga. 543.

[70] Dwight v. Whitney, 15 Pick. (Mass.) 179; Goodenow v. Tyler, 7 Mass. 36. Proof of a custom among merchants, where merchandise is sold on condition, to deliver it to the buyer before the condition is complied with, and that such a change of possession is not in fact a waiver of such condition, is admissible to establish the fact that the title to the property did not pass by such delivery. Farlow v. Ellis, 15 Gray (Mass.), 229.

[71] Smith v. Wright, 56 Ala. 417.

the period in question.[72] Opinions or conclusions of witnesses as to the effect of a usage of trade either upon a contract or the legal rights of parties are not admissible to show either the character or force of the usage.[73]

If a usage in the conduct of a particular business is established in one locality, it will, in the absence of evidence to the contrary, be presumed that it prevails in other similar establishments, at least in the vicinity.

[72] Chenery v. Goodrich, 106 Mass. 566.

[73] Haskins v. Warren, 115 Mass. 514.

In order to disprove the application of a usage or of regulations of a board, as a Chamber of Commerce, having corporate powers, to appoint an inspector of certain classes of goods, as in the case cited below, one of the purposes of the rules of which is declared to be, "To establish uniformity in the commercial usages of the city," to a certain class of property, it is competent to show that certain classes of articles are specified as subject to the rules or usage, but that the article in question is not named, and the effect of this is to show the non-existence of such usage as to the articles not named. Kershaw v. Wright, 115 Mass. 361.

Thus, in a Pennsylvania case, Citizens' Ins. Co. v. McLaughlin, 53 Penn. St. 485, a policy was issued by the defendant upon a patent leather manufactory in Pittsburgh, Pa., belonging to the plaintiff. The policy provided that benzole in quantities not exceeding five barrels might be kept in a shed detached from and in the rear of the main building, and nowhere else on said premises. It was well known that benzole was an important and essential article in the prosecution of the business and was necessarily and universally used. The custom of the plaintiff's workmen was to carry an open bucket of it into the factory as often as wanted, and upon the morning of the fire a workman carried an open bucket of it into the factory and set it down, when it almost instantly ignited, and, communicating the flames to the building, it was burned down. To prove that the method of carrying the benzole into the factory in open buckets was according to the custom of the trade, it was shown by the testimony of a witness that it was the custom in *twelve* similar factories in Newark, New Jersey, *and no evidence being introduced to show a contrary custom in Pittsburgh*, where the plaintiff's factory was located, it was held sufficient to establish the usage in Pittsburgh. WOODWARD, J., upon this point, said "We think there was no error in the admission of the evidence of Harden. He gave an intelligible account of the mode of using benzole in twelve similar factories in Newark, New Jersey, and said it was brought in and used from cans and buckets. *If any other custom had been established at Pittsburgh it could have been shown, but in the absence of all other evidence on the subject, this was competent to fix the usage of the business.*" Thus it will be seen that while the usage of a certain trade in one locality is not necessarily the usage of the same trade in another, yet such usage may be proved, and, unless a different usage is shown to exist in the locality to which it is sought to apply it, it will be presumed to be usage of the trade in that locality. In a New Hampshire case, Sumner v. Tyson, 20 N. H. 384, evidence of a custom among iron manufacturers to warrant the quality of all the goods made by them was held to be established by proof of such a custom in three similar establishments in the vicinity, there being no evidence of a contrary custom in any other similar establishment.

A usage must be proved by evidence of facts and instances in which it has been acted upon,[74] and in a case where the question was, whether a certain practice had been tolerated to a certain extent at a custom house, the party denying the practice was held entitled to a ruling that the practice is not established if no witness can recall a specific instance of it.[75]

F. Mere Conflict of Evidence as to, does not defeat.

While it may be considered settled at this day, according to the views of Gray, C. J., as expressed in Jones v. Hoey, 128 Mass. 585, that a custom may be established by one witness, yet the testimony of that witness must be sufficiently convincing and patent to create in the minds of the jurors a full conviction of the existence of the custom. A custom cannot be said to be an established one if it is in serious dispute and can only be determined by carefully and nicely adjusting the scales to ascertain which side preponderates. The character and description of evidence admissible for establishing the custom is the fact of a general usage and practice prevailing in the particular trade or business, and not the opinions of witnesses as to the fairness or reasonableness of it. While many early cases held that the custom could not be established by one witness, this rule has been almost universally departed from. It is nevertheless true that the custom must be proved by evidence sufficient to satisfy the jury clearly and convincingly that such a usage existed as can fairly be presumed to have entered into the intention of the parties when they entered into the contract. The character of the proof must be clear, cogent, and convincing as to the antiquity, duration, and universality of the usage in the locality where it is claimed to exist. Where the evidence is uncertain and contradictory, the custom is not established, and the court should so instruct the jury. So an instruction that the custom may be established by a preponderance of the evidence is erroneous.[76]

The mere fact that the evidence is conflicting does not entitle the party, against whom the usage is invoked, to a ruling that the usage is not proved, but it is for the jury to say from all the evi-

[74] Mills v. Hallock, 4 Edw. Ch. (N. Y.) 652.

[75] Chenery v. Goodrich, 106 Mass. 566.

[76] Penland v. Ingle (N. C., 1905), 50 S. E. 850. Custom as to commission of real estate brokers.

dence whether or not the usage is established.[77] But if only *one* witness testifies to the existence of a usage, and another equally competent and of equal credibility contradicts such evidence, it is not proper to leave it for the jury to say whether the usage is established or not, but they should be instructed that the evidence is insufficient.[78] Upon the question as to whether a certain usage

[77] Upton v. Sturbridge Cotton Mills, 111 Mass. 446. In Winsor v. Dellaway, 4 Met. (Mass.) 221, where contradictory evidence was offered as to the existence of a usage on which the plaintiff relied to support his action, and the jury were instructed that, if it was proved that the usage existed, and the defendant knew it existed, the plaintiff was entitled to recover, and the jury thereupon returned a verdict for the defendant; it was held that the plaintiff had no cause of exception to such instruction. See, also, Tunell v. Carter, 25 Ala. 498, to same effect.

[78] Parrott v. Thacher, 9 Pick. (Mass.) 426. In the absence of better proof it was held that evidence of long and uninterrupted usage, reputation, the declarations and conduct of the owners of the adjoining land, and the public acts of the town, was properly admitted to prove that an ancient corporation of proprietors, now extinct, had dedicated a certain lot to the public use, as a landing place. Sevey's case, 6 Me. 118. Evidence by a justice of the peace that, when called upon by parties to prepare conveyances for them, it was his habit to inquire whether they desired absolute or conditional conveyances; that he had no doubt such inquiry was made in the present instance; that he never failed to shape the paper according to the expressed object of the parties; and that he was also in the habit of reading the papers after they were written to those for whom they were prepared, and especially if they were workmen, was held inadmissible. Pocock v. Hendricks, S. G. & J. (Md.) 421. In an action by commission merchants in Boston, to recover back money paid to the consignor of goods sold by the plaintiffs to a trader in the country, who failed to pay for them, evidence to show a usage of factors in Boston to credit the amount of sales immediately to the account of the principal, and charge back in case of the insolvency of the purchaser, in case the factor has not been negligent; and also to show the usage as to the credit given to city and country purchasers, was held to be admissible. Dwight v. Whitney, 15 Pick. (Mass.) 179. Witnesses may be examined to prove the *course* of a particular trade, but not to show what the law of that trade is. Ruan v. Gardner, 1 Wash. (U. S.) 145; Austin v. Taylor, 2 Ohio, 64. A witness, who had lived both in New York and Mobile, understood it was the custom of merchants that the employer should pay the expenses and passage of clerks who were engaged in the former place to do service in the latter place, for the whole of the ensuing business season; that the witness, who was a merchant, had never so employed or paid a clerk, but he knew of one case where, under a stipulation to that effect, the wages and passage money of a clerk thus employed were paid by the employer. Held, that this evidence was inadmissible, and consequently incompetent to establish the usage or custom of trade. Price v. White, 9 Ala. 563. The plaintiff having proved that a steamboat of the defendants was engaged in carrying goods and merchandise, generally, for hire, and the general custom of boats engaged in similar business with that of the defendant, held that it was admissible for the defendant to explain the usage, by showing that no freight or compensation was ever charged or allowed upon remittance of money, unless some evidence was given by the boat of its receipt, in which event only, a charge was made. Knox v. Rives, 14 Ala. 249.

exists or not, a witness may be asked to describe how, under the usage, a transaction like the one in question would be conducted by all the parties thereto from its inception to its conclusion.[79] It may be said that *a usage of a trade must be proved by the multiplication or aggregation of a great number of particular instances, showing a given course of business, and a general, established undertaking respecting it.*[80] It is not necessary that there should be either the antiquity, uniformity or notoriety that is essential to establish a custom; it is sufficient *if it is shown to be so well known and so generally acquiesced in that it may reasonably be presumed to have been imported into their contract by the parties.*[81] In a word, it must be shown that the usage is certain and reasonable, and so universally acquiesced in that every one engaged in the trade knows it, or might know it if he exercised reasonable diligence in making inquiry.[82]

G. Effect of Local or Trade Usage.

There is a clear distinction between usage, however general, and custom. Usage is local practice and must be proved. Custom is general practice judicially noticed with proof. Usage consists of a repetition of facts. Custom arises out of this repetition. Usage is the evidence of custom. There may exist a usage that would affect or control the contract and yet not reach the dignity of a custom or law.[83]

A mere *local* usage is not binding upon a party unless he has notice or knowledge of its existence at the time when the contract was entered into,[84] and the burden of establishing knowledge is on the party setting it up,[85] or it must be shown to be so general

[79] Kershaw v. Wright, 115 Mass. 361.

[80] MacKenzie v. Dunlop, 3 Macq. H. L. Cas. 22.

[81] Juggomohun Ghore v. Manickhund, 7 Moore Ind. App. 263.

[82] Place v. Allcock, 4 F. & F. 1074.

[83] Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511.

[84] Kirchner v. Venus, 12 Moo. P. C., N. S. 361; Rogers v. Mechanics' Ins. Co., 1 Story (U. S.), 603; Hall v. Howell, Harp. (S. C.) 427; Simpson v. Margetson, 11 Q. B. 32; Albatross v. Wayne, 16 Ohio, 513; Latimer v. Alexander, 14 Ga. 250; Flynn v. Murphy, 2 E. D. S. (N. Y. C. P.) 378; Barnard v. Kellogg, 10 Wall. (U. S.) 383.

[85] Baxter v. Sherman, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631. A local custom of merchant brokers is not binding on a non-resident shipper unless he had knowledge of the custom and consented to it. S. W. Bacon Fruit Co. v. Blessing (Ga., 1905), 50 S. E. 139.

that the parties are presumed to have knowledge of it.[86] Thus where a custom in a certain city to suspend business on the Fourth of July is settled, well established and generally known, one shipping goods to that city is bound by the custom, although he has no personal knowledge of it. A custom or usage will not be held binding if it be unreasonable and it cannot be used for the purpose of varying the terms of the contract or violating a certain rule of law, but where a contract required a railway company to transport goods to their destination according to its regular course of business and with all reasonable dispatch the custom of suspending business on the Fourth of July did not vary the contract and was binding on the parties.[87] But a local custom of the meaning of the term "cash sale" has been held inadmissible to bind one living outside without notice of it.[88] The usage or custom of a particular port, in a particular trade, is not such a usage or custom as will, in contemplation of law, limit, control or qualify the language of a contract of insurance. It must be some *known, general* usage or custom in the trade, both applicable and applied to all ports of the State, and so notorious as to afford a presumption that all contracts of insurance in that trade are made in reference to it as a part of the policy.[89] So a fire insurance company doing business upon the Pacific coast may be bound by a custom among such companies when granting re-insurance to other fire insurance companies to charge and collect premiums as and from the date of re-insurance and to write other policies so as to cover their insurance from the date upon which their insurance is granted.[90] Indeed, any usage, to be binding, must be established by such clear and satisfactory evidence that a presumption naturally arises that the parties contracted in reference to it.[91]

A custom in a place from which goods are shipped, is not necessarily binding upon a consignee at another place, and from the

[86] John O'Brien Lumber Co. v. Wilkinson (Wis., 1904), 101 N. W. 1050.

[87] Penn. Railroad Co. v. Naive (Tenn., 1904), 79 S. W. 124.

[88] Rake v. Townsend (Iowa, 1905), 102 N. W. 499.

[89] Rogers v. Mechanics' Ins. Co., *ante;* Pittsburgh Ins. Co. v. Dravo, 2 Weekly Notes Cases, 194; Dean v. Swoop, 2 Binn. (Penn.) 72; Adams v. Ins. Co., 76 Penn. St. 411; Cope v. Dodd, 13 id. 33; McMasters v. R. R. Co., 69 id. 374.

[90] Union Insurance Co. v. American Fire Insurance Co., 107 Cal. 327, 40 P. 431, 48 Am. St. Rep. 140.

[91] Bowling v. Harrison, 6 How. (U. S.) 259; Strong v. Carrington, 11 Am. Law Reg. 287; Olericks v. Ford, 23 How. (U. S.) 49; Collings v. Hope, 3 Wash. (U. S. C. C.) 149; Pierpont v. Fowle, 2 W. & M. (U. S. C. C.) 24.

mere fact of the existence of a certain custom at the place of shipment, a jury would not be warranted in presuming that such a usage existed at the place to which the goods were consigned. Thus, the fact that a usage existed at a city from which goods were shipped, that the bill of lading shall not be detached from the draft until the draft is paid, was held not sufficient to warrant the jury in presuming that such usage existed in a neighboring city to which the cargo was consigned.[92] In order to make such a usage valid, it must be recognized and acted upon in both cities, and mere proof of its existence in one place does not warrant an inference that it exists at another.[93] But when instances of its application in one place are shown, it may be shown to exist in other places for the purpose of establishing uniformity or notoriety.[94] The usage at the place of manufacture prevails, rather than the place of sale, where the contract relates to the manufacture of an article.[95]

In New York it is held that proof of a *local* usage is inadmissible to control the rules of law respecting a particular trade;[96] or to vary an express agreement;[97] or add incidents thereto contrary to the rules of the general law, as to import a warranty where *caveat emptor* applies;[98] or to qualify the plain provisions of a contract about which there is no ambiguity;[99] or to contradict its plain legal import;[100] or to overcome a settled rule of commercial law, but it may be received to explain it.[101] A local usage can-

[92] Kirchner v. Venus, 12 Moore P. C. C. 361; 7 W. R. 455; Mears v. Waples, 3 Houst. (Del.).

[93] Reynolds v. Continental Ins. Co., 36 Mich. 131.

[94] Citizens' Ins. Co. v. McLoughlin, 53 Penn. St. 485.

[95] Star Glass Co. v. Morey, 108 Mass. 576.

[96] Higgins v. Moore, 34 N. Y. 417; Minnesota R. R. Co. v. Morgan, 52 Barb. (N. Y.) 217; Bissell v. Campbell, 54 N. Y. 353.

[97] Main v. Eagle, 1 E. D. S. (N. Y. C. P.) 619; Stebbins v. Brown, 65 Barb. (N. Y.) 274; Beals v. Terry, 2 Sandf. (N. Y.) 127.

[98] Hawes v. Lawrence, 3 Sandf. (N. Y.) 193; also 4 N. Y. 345; Beirne v. Dord, 5 N. Y. 95.

[99] Callender v. Dinsmore, 55 N. Y. 200; Bradley v. Wheeler, 44 id. 495; Mercantile, &c., Ins. Co. v. State Ins. Co., 25 Barb. (N. Y.) 319; Groat v. Gile, 51 N. Y. 431; Simmons v. Law, 8 Bos. (N. Y.) 213.

[100] Holmes v. Pettingill, 1 Hun (N. Y.), 316; Allen v. Dykers, 3 Hill (N. Y.), 593; Dalton v. Daniels, 2 Hilt. (N. Y. C. P.) 472; Vail v. Rice, 5 N. Y. 155; Lombardo v. Case, 45 Barb. (N. Y.) 95; Sewall v. Gibbs, 1 Hall (N. Y.), 602; Lawrence v. Maxwell, 53 N. Y. 19; Taylor v. Ketchum, 35 How. Pr. (N. Y.) 289; Wadsworth v. Alcot, 6 N. Y. 64; Spears v. Hart, 3 Robt. (N. Y.) 420; Currie v. Smith, 4 Leg. Obs. (N. Y.) 343; Lane v. Bailey, 47 Barb. (N. Y.) 395; Wall v. Ins. Co., 3 Duer (N. Y.), 264; Bargett v. Oriental Ins. Co., 3 Bos. (N. Y.) 385; Suydam v. Clark, 2 Sandf. (N. Y.) 133.

[101] Firth v. Barker, 2 John. (N. Y.) 327; Emery v. Dunbar, 1 Daly (N. Y. C. P.), 408; Bowen v. Newell, 8

not be given effect to vary a contract, as a usage for pledgees of stock to transfer it at pleasure, when the contract of pledge only provided that it might be transferred after default.[102] But in an action against a pawnbroker for conversion in selling an article pawned, the defendant may prove a general custom of pawnbrokers known to the plaintiff, to sell unredeemed pledges after six months.[103] No evidence will be received of a usage offered to alter the legal effect of an insurance policy,[104] or of a usage to satisfy contracts for the sale of flour of a specified brand, by the delivery of other brands of equal or better quality.[105] Or to admit of the delivery of an article made from different materials from those specified in a contract, as where a contract is to build a "*black walnut*" counter, to show that it is customary to make the tops and door panels of such counters of stained white wood.[106] Or to treat as a delivery that which is not in law a delivery.[107] A local usage can never vary the construction of a contract, unless it is clearly proved that its existence was known to the parties, and that their contract was made in reference to its terms.[108] Nor if it contradicts the contract.[109] Where the plaintiff is made by con-

N. Y. 190; Gibson v. Culver, 17 Wend. (N. Y.) 305.

[102] Dykers v. Allen, 7 Hill (N. Y.), 497; affirming S. C., 3 id. 593; Vail v. Rice, 5 N. Y. 155; Currie v. Smith, 4 Leg. Obs. (N. Y.) 343.

[103] Stern v. Leopold Simons & Co. (Conn., 1904), 58 A. 696.

[104] Stebbins v. Globe Ins. Co., 2 Hall (N. Y.), 632; Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235.

[105] Beals v. Terry, 2 Sandf. (N. Y.) 127.

[106] Greenstine v. Borchard, 50 Mich. 434; 45 Am. Rep. 51.

[107] Suydam v. Clark, 2 Sandf. (N. Y.) 133; and see Smith v. Lynes, 5 N. Y. 41.

[108] Wheeler v. Newbould, 5 Duer (N. Y.), 29; affd., 16 N. Y. 392.

[109] Sweet v. Jenkins, 1 R. I. 147.

A custom of a particular locality for the owner of a lot of land, after giving notice to the owner of an adjoining lot to build his half of a partition fence, and his refusal to do so, to build the whole, and hold the party refusing for his share of the expense, has been held to be a reasonable and just custom, which may be enforced. Knox v. Artman, 3 Rich. (S. C.) 283. A shipper of goods is chargeable with notice of an established and well-known usage, existing in a particular trade, in regard to the stowage of a general ship, both as to the manner of stowing, and as to the different articles to be stowed together. And if the shipper, in such case, gives no special instructions, and his goods are stowed in conformity with such usage, he is deemed to have assented to such mode of stowage, and cannot, in case his goods are injured on the voyage, in consequence of the mode of stowage, set that up as a ground of complaint, or as a foundation for depriving the owners of their freight. Baxter v. Leland, 1 Blatch. (U. S. C. C.) 526. Where a cargo was carried by a vessel "addressed to" the owner of the cargo, he was held to be entitled to no commissions on the freight, and any usage giving him commissions in such a case was held to be an unreasonable one, and the shipper was allowed no deduction from the freight, because wood and water, usually stowed on deck, had

tract the "exclusive agent" of the defendant in a certain district, evidence is admissible of a trade usage giving him commissions on all sales made by others in his district.[109a] The court must judge of the reasonableness and validity of any usage.[109b]

been stowed below, as it appeared that the bulkheads had been so moved as to give about the same amount of room, Jelison v. Lee, 3 W. & M. (U. S. C. C.) 368. In a case where a master and his vessel were employed near Canton, in China, in a service not strictly within their ordinary offices, and not, originally, in any way contemplated, the ship being used, by an arrangement with the agent of the owner at Canton, for twenty-two months, as an opium store-ship, and, according to usage, a sum of five dollars on each box was paid on the delivery of the opium, which was called "Kumshaw," and which was exclusive of the price paid for storage, and the "kumshaws" were paid to the master, with the acquiescence of the agent, there having been no express agreement made with respect to the same, it was held, in a suit by the owner of the vessel against the master, to recover the "kumshaws," as a part of the earnings of the vessel, that it should be left to the jury to say whether, by the usage of the trade, the "kumshaws" belonged to the master. Willcocks v. Phillips, 1 Wall., Jr. (U. S.) 47.

[109a] Garfield v. Peerless Motor Car Co., (Mass., 1905), 75 N. E. 695, *contra* Golden Gate Packing Co. v. Farmers' Union, 55 Cal. 606.

[109b] Thus, where there is proof of an agreed price or compensation, or of a usage which might affect it, or from which an agreement might be inferred, it would not be correct to authorize the jury to judge of the reasonableness of the charges, irrespective of such agreement or usage; but the court should determine whether, if proved to the satisfaction of the jury, the usage is reasonable or operative. Codman v. Armstrong, 28 Me. 91. Exercising this power, it has been held that a local custom that ship-owners shall be liable for the negligence of their agents, in cases where the statute exempts them from liability, is unreasonable and therefore invalid. Walker v. Trans. &c. Co., 3 Wall. (U. S.) 15. So, too, that evidence of a custom that a master of a vessel in a particular port has no authority to bind his owners for necessaries furnished to the vessel, is inadmissible, as it would contradict and control a settled rule of maritime law, of universal application. Bliss v. Ropes, 9 Allen (Mass.), 369. In a New York case (Lombardo v. Case, 45 Barb. [N. Y.] 205), in an action on a contract to deliver certain railroad stock, it was held that the plaintiff would not be permitted to prove that, by the general custom of brokers and dealers in stocks in the city of New York, the words "dividends or surplus dividends," in the contract, were intended to mean dividends declared on the stock, whether they had been announced before or after the date of the contract, provided that on the day the contract was made the stock was selling in the market "dividend on," and not "ex-dividend," for the reason that effect could not be given to the custom without making a new contract between the parties. It was also held in the same case that the words "six months from date" cannot, by proof of any custom, be extended or explained to mean or include "a day or two before date." In a New Jersey case (Overman v. Hoboken City B'k, 30 N. J. L. 61), it was held that the holder of a check drawn upon a bank cannot avail himself of a custom by which banks belonging to an association called the clearing house, of which the drawee was one, are bound to return checks presented through the clearing house, and which they have no funds to pay, upon the same day, or before banking hours of the next day, under penalty of being liable for the same, and that the fact that the check was presented through the clearing house by a bank which belonged to that asso-

When a special contract is proved, evidence is not admissible to show a conflicting general custom.[110] In an action by the payee of a note given for the purchase-money of a mining claim in California, evidence of a custom there for the vendor to return a note so given if the claim proved unprofitable, as it did in this case, is not a defense without proof that the custom was known to the plaintiff, and even if the custom set up had been well established, it would be invalid because unreasonable.[111] Evidence of a usage with other banks organized under the same law to discount more than the legal rate of interest, upon the acquisition of business paper, is not admissible in a suit by a bank upon the paper so discounted,[112] because a usage in violation of a statute, or which furnishes a pretext or excuse for avoiding it, is bad.[113] Special usages are not binding, unless known to the party sought to be charged thereby.[113a]

ciation, and acted as the agent of the holder, can make no difference, as customs in derogation of the common law must be strictly pleaded, and when well pleaded, the count must show a case clearly within the usage. Therefore an allegation of a custom that when a check is presented at the clearing house to a bank against which the check is drawn, it shall be returned within a certain time if not paid, does not cover the case of the presentment of a check to a bank which is the agent of the bank upon which it is drawn. In an action against a railroad company, by a person employed in repairing their road, to recover for injuries received while being carried by them to his work, the defendants alleged that the plaintiff was negligent in riding in the baggage car. It was held that evidence that it was the custom for such workmen to ride in the baggage car was admissible. O'Donnell v. Allegheny R. R. Co., 50 Penn. St. 490. In an action upon a contract to receive at a future day a certain number of barrels of flour at a fixed price, evidence is not admissible to prove a custom that either party to such a contract has a right to demand a margin to be put up, reasonably sufficient to secure the performance of the contract. Oelrichs v. Ford, 21 Md. 489.

[110] Exchange Bank v. Cookman, 1 W. Va. 69; Detwiler v. Green, ib. 109.

[111] Leonard v. Peoples, 30 Ga. 61.

[112] Niagara County Bank v. Baker, 15 Ohio St. 68.

[113] New York Fireman's Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; Bank of Utica v. Wager, 2 id. 712; Dunham v. Dey, 18 John. (N. Y.) 46.

[113a] Thus, if the master of a vessel hires a berth for her at a wharf, without notice of any rule of that wharf concerning the mode of discharging cargoes different from the usage at similar wharves in the same port, a stevedore whom he employs to discharge his cargo may do so according to such usage, and, if prevented by the wharfinger, may maintain an action against him for damages. Croucher v. Wilder, 98 Mass. 322. So in an action on a policy of insurance, evidence of a local custom amongst insurers, not communicated to the insured, nor of such notoriety as to afford any presumption of knowledge on his part, is not admissible. Hartford Protective Ins. Co. v. Harmer, 2 Ohio St. 452. But in an action on a policy of insurance, evidence is competent to prove a usage that where there has been a verbal agreement for insurance, and the terms agreed upon and entered in the books of the company, the con-

But it must be remembered that *where words used in a contract have a well defined meaning, and are not used in a technical sense, proof of a meaning acquired by them in a certain trade by usage is not admissible to put upon them a different meaning.*[114] Thus it has been held, that where a bond is made payable in "current money of Philadelphia," parol evidence is not admissible to show that it was intended to be paid in specie,[115] and so as to the meaning of the words "more or less" in a contract, because, in the absence of any general or special usage giving to them a different signification, the words have a definite meaning, and oral proof is not admissible to show that the parties intended to use them in a different sense.

But where a word is used in a contract which the court is unable to construe without explanation, it is proper to admit evidence of the *peculiar* use and meaning which the word has acquired by usage in a particular business to which the contract relates, or in the locality in which it is used;[116] as, to show what is meant by the

tract for insurance is considered as valid for the insured, although the premium is not paid. Baxter v. Massasoit Ins. Co., 13 Allen (Mass.), 320. The practical adoption and use, for a long time, of a particular route, under a right of way granted by deed, without fixed and defined limits, if acquiesced in by the grantor, operate to determine the location of the way as effectually as if the same had been described in the deed, because by acquiescing in the continued use of such route the owner of the land is treated as licensing that as the way granted, and the other by using it is treated as electing to adopt it. Bannon v. Angier, 2 Allen (Mass.), 128. In an English case the defendant chartered the plaintiff's vessel to proceed to Newcastle-on-Tyne, and there be ready forthwith, "in regular turns of loading," to take on board by spout or keel, as directed, a complete cargo of four keels of coal, and the remainder coke. In an action for not loading the vessel with coke within a reasonable time, it was held that evidence was admissible to explain the meaning of the expression in the charter party, "in regular turns of loading," by showing that there was a usage of the port of Newcastle that vessels should take their cargoes of coke in a certain regular order or turn, and that the question whether the vessel was loaded within a reasonable time ought not to be decided without reference to such usage, if proved. Leideman v. Schultz, 14 C. B. 38. Evidence of a usage in a certain town to sell lumber without measuring it is admissible if the lumber to which it is sought to be applied is not shown to have been brought into the town by water and as such required by statute to be measured. Lee v. Kilbourne, 3 Gray (Mass.), 594.

[114] Smith v. Battams, 26 L. J. Exch. 32; Parkinson v. Collier, Park on Ins. 416.

[115] Bond v. Hans, 2 Dall (U. S.) 133.

[116] Cowles v. Garrett, 30 Ala. 341; Barron v. Placide, 7 La. An. 229; Hart v. Hammett, 18 Vt. 127; Hulbert v. Cowen, 37 Barb. (N. Y.) 62; Ganson v. Madigan, 15 Wis. 144; Colwell v. Lawrence, 24 How. Pr. (N. Y.) 334; Smith v. Clayton, 29 N. J. L. 357; Locke v. Rowell, 47 N. H. 46; Fitch v. Carpenter, 43 Barb. (N. Y.) 35; Stone v. Bradbury, 14 Me. 185; Myers v. Walker, 24 Ill. 133; Williams v. Wood, 16 Md. 220;

words "good merchantable shipping hay,"[117] "good custom cowhide boots," [118] or "a farm," or a "homestead farm" in a lease,[119] or that a right to "deepen a ditch" includes the right to widen it,[120] or the "usual and customary method of engaging and paying a fishing crew," to establish the kind of voyage contemplated,[121] to show what particular word an abbreviation was intended to represent, [122] to show what is meant by the word "team" in a contract,[123] or by "damages of the river" in a bill of lading,[124] or the number of hours regarded as a "day's work" in a particular trade,[125] or that contracts of certain description, by the custom of a particular business, are regarded as bonds,[126] or the meaning of the word "currency" when used in a note or contract,[127] or of the words "on margin" in a broker's contract relating to the sale or purchase of stock.[128]

Wayt v. Fairbanks, 1 Brayt. (Vt.) 77; Hite v. State, 9 Yerg. (Tenn.) 357; Brown v. Brooks, 25 Penn. St. 210; Stewart v. Smith, 28 Ill. 397. The rule that courts are to give construction to contracts is frequently departed from, where the contracts relate to the scientific or mechanic arts, or contain words of a technical or local signification. In such cases, it is common and prudent to admit the opinions of experts, to explain the contract. Reynolds v. Jourdan, 6 Cal. 108; Myers v. Walker, 24 Ill. 133; Galena Ins. Co. v. Kupfer, 28 Ill. 332; Prather v. Ross, 17 Ind. 495; Taylor v. Stototingo, 6 La. An. 154; Broadwell v. Broadwell, 1 Gill (Md.), 599; Williams v. Woods, 16 Md. 220; Smith v. Clayton, 29 N. J. L. 357; Stroud v. Frith, 11 Barb. (N. Y.) 300; Hulbert v. Cawer, 37 id. 62; Colwell v. Lawrence, 24 How. (N. Y.) P. 324; Brown v. Brooks, 25 Penn. St. 210; Cary v. Bright, 58 id. 70; Harb v. Hammett, 18 Vt. 127. While parol evidence, to show that the parties to an instrument placed upon a certain word or phrase a meaning controlling the whole effect of an instrument, is not admissible, yet such evidence to show the scientific as well as popular meanings of such words, is admissible. Hartwell v. Camman, 10 N. J. Eq. 128.

[117] Fitch v. Carpenter, 43 Barb. (N. Y.) 40.

[118] Wait v. Fairbanks, *ante*.

[119] Locke v. Rowell, 47 N. H. 46.

[120] Collins v. Driscoll, 34 Conn. 43.

[121] Eldridge v. Smith, 13 Allen (Mass.), 140.

[122] Hite v. State, 9 Yerg. (Tenn.) 357.

[123] Ganson v. Madigan, 15 Wis. 144.

[124] Sampson v. Gazzam, 6 Port. (Ala.) 123.

[125] Barnes v. Ingalls, Ala. 193. In this case among "photographers." See also Hinton v. Locke, 5 Hill (N. Y.), 437, in the case of carpenters, and also as to extra pay for more hours' work.

[126] Stone v. Bradbury, 14 Me. 185.

[127] Pilmer v. State Bank, 16 Iowa, 321. But not what is meant by "current funds." Osgood v. McConnell, 32 Ill. 74; Ehle v. Chittenango Bank, 24 N. Y. 548; Marc v. Kupper, 34, Ill. 287.

[128] Hatch v. Douglass, 48 Conn. 116; 40 Am. Rep. 154. In this case the defendant wrote the plaintiff: "I want to buy, say one hundred shares of Union Pacific stock on margin." CARPENTER, J., said: "What does that mean? Those unacquainted with the business would not understand its meaning from the language. It is not to be presumed that the court understood it. The plaintiff produced witnesses who were familiar with the business, and who knew from experience and observation the

H. Usage in Particular Market.

It is settled by the weight of authority that where a principal sends an order to a broker engaged in an established market or trade, for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not charge in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal; provided the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, morals or public policy. So the rules of the cotton exchange or board of trade are admissible in evidence to explain a contract entered into in view of them.[129] One dealing in a particular market, as in the stock yards, will be taken to be bound by the custom of business of that market whether he knows it or not; so his agent will be taken to have authority to act according to the usual course of dealings of agents in that market,[130] as for instance, in selling out stock carried for a customer on his failure to make good his margin, in accordance with a stock exchange custom.[131] So a shipper's custom as to the meaning of certain terms in a bill of lading may bind a party who misunderstood it. Thus the expression "Line via Harlem River" may be shown to refer to shipments from Western points to New England with right of diversion at Albany, Poughkeepsie or New York City, and not to be limited to shipments from New York City as the consignee was held bound by the general custom of the grain trade.[132]

When a sale is made in a place where a board of trade exists, which has established certain rules relating to the sale of certain classes of property, as cotton, and a purchaser being informed of

meaning attached to the words to prove their meaning. The defendant objected, but the court admitted the evidence, and, we think, properly. Nelson v. Sun Mutual Ins. Co., 71 N Y. 453. It was in the nature of a *technical phrase*, the meaning of which must be understood before the court could know what the contract between the parties really was."

[129] Bibb v. Allen, 149 U. S. 481, 489, 13 S. Ct. 950; Hansen v. Boyd, 161 U. S. 397, 16 S. Ct. 571; Hatch v. Douglass, 48 Conn. 116, 40 Am. Rep. 154.

[130] Union S. Y. & T. Co. v. Mallory, etc. Co., 157 Ill. 554, 41 N. E. 888; 48 Am. St. Rep. 341.

[131] Van Dusen-Harrington Co. v. Jungeblut, 75 Minn. 298, 77 N. W. 970; 74 Am. St. Rep. 463.

[132] Soper v. Tyler (Conn., 1904), 58 A. 699.

such rules does not dissent or object to them, but proceeds with the contract, those rules become a part of the contract as much as though they had been incorporated into it, although they have not existed or been acted upon long enough to acquire the character of a custom or usage of the trade.[133]

I. Usage must be Reasonable and Legal.

In order to be valid and binding, it is necessary that a usage should be reasonable, and it has been held that it is not reasonable if an honest or right-minded man would deem it unfair or unrighteous.[134] It is very evident that this is a necessary incident. Usages are the result of the experience of mankind, and have been planned with a view to their convenience. But nothing absolutely unreasonable could result from the former, or tend to produce the latter. The self-will of an individual might make dishonesty or nonsense paramount for a day, but the experience of men never could consecrate what was unrighteous, their convenience and comfort never could be subserved by what was unjust or unreasonable. Where evidence of a usage has been admitted, therefore, evidence may be given in reply, tending to show that such a supposed usage would be unreasonable.[135]

[133] Leigh v. Mobile, etc., R. R. Co., 58 Ala. 165.

[134] Paxton v. Courtney, 2 F. & F. 131; see Leuckhart v. Cooper, 3 Scott, 512; 3 Bing. N. C. 99; see also Southwestern Freight, &c., Co. v. Stanard, 44 Mo. 71.

[135] Bottomly v. Forbes, 5 Bing. N. C. 128. A usage or custom that makes a negotiable instrument transferrable without indorsement is against the policy of the law, and therefore invalid. Thus, a local custom among cotton dealers making a warehouse receipt transferable by delivery without indorsement, and such mere transfer to pass the title to the cotton unless notice is given that a receipt has been lost or got into the hands of some one not entitled to hold it, was held bad. Lehman v. Marshall, 47 Ala. 362. So a usage that no title passes upon an ordinary sale and delivery—no lien being reserved by contract without payment of the purchase-money, is invalid. Haskins v. Warren, 115 Mass. 514. In the case last cited the court took occasion to place the ground of invalidity upon the circumstances that it was an attempt by usage to engraft terms upon a contract inconsistent with the rules of common law, but it would seem that the true ground of invalidity is the circumstance that such a usage is against the policy of the law. So is a usage requiring a consignee to receipt for a certain quantity of property before he has had an opportunity to ascertain whether the quantity named in the receipt has been delivered; Gallup v. Ledener, 1 Hun (N. Y.), 282, and the same is true as to a usage for the master of a vessel to sell the cargo of a stranded vessel without necessity; Bryant v. Conn. Ins. Co., 6 Pick. (Mass.) 145; Stillman v. Hurd, 10 Tex. 107; or authorizing a person to charge for services never rendered, or material never furnished; Whitesides v. Meredith, 3

A custom will be held unreasonable where it permits an agent

Yeates (Penn.), 318 Kendall v. Russell, 5 Dana (Ky.), 50; or authorizing an agent to violate the instructions of his principal; Banksdale v. Brown, 1 N. & M. (S. C.) 519; Catlin v. Smith, 24 Vt. 85; exempting carriers from liability for negligence; Schooner Reeside, 2 Sum. (U. S.) 574; or favoring the violation of a statute; Dunham v. Dey, 13 John. (N. Y.) 44; Supervisors v. Van Rief, 1 Hun (N. Y.), 45; or conferring a right of action upon contracts void under the Statute of Frauds, or barred by the Statute of Limitations; Dunham v. Gould, 13 John. (N. Y.) 367; or to transfer settlement rights by death-bed donations without a will; Westfall v. Singleton, 1 Wash. (Va.) 227; or for factors to pledge the goods of their principal; Newbold v. Wright, 4 Rawle (Penn.), 195; or to construe a contract for articles by the ton, as calling for 2,200 pounds for a ton instead of 2,000 pounds, as fixed by statute; Evans v. Myers, 25 Penn. St. 114; Green v. Moffat, 22 Mo. 529. But see *contra* Miller v. Stevens, 100 Mass. 518; or one that is in restraint of trade, Williams v. Gilman, 3 Me. 281; or that deprives a person of his property without compensation, as a usage of a bank not to correct mistakes in counting money unless it is discovered before the party leaves the bank, Gallatin v. Bradford, 1 Bibb (Ky.), 207. Where a custom for the inspector of flour to take to his own use the draft flour, drawn out to be examined, was set up, it was held that it was contrary to the policy of the law; that the statute providing certain fees for inspection, thereby impliedly forbade all other compensation; that it could not be more ancient than the inspection laws, and that they were not old enough to be immemorial, though beyond the actual memory of those then living; that though this custom had existed under the old laws, and the legislature, in remodeling them, had not expressly negatived the custom, yet that this silence was not a legislative recognition of it. And where such inspector of flour claimed that he could not inspect by boring a half-inch hole in the head of the barrel, and that the custom allowed him to use a larger auger; the old law required him to inspect flour by a half-inch hole, while the new code required all inspectors of flour, fish, butter, &c., to inspect by a half-inch hole or in some other satisfactory manner, and required the hoops of barrels offered for inspection to be nailed. It was held that the code did not change the method of inspection established by the old law, and that it was no answer to a *mandamus* to compel the inspector to inspect a certain lot of flour by a half-inch hole, that he could not so inspect it properly, and that the custom authorized him to use a larger hole, as both the answer and the custom would be in contravention of the statute under which he held his office. Dalaplaine v. Cranshaw, 15 Gratt. (Va.) 457. So a custom is invalid that exempts a person from liability where he is made liable by statute, or makes him liable where he is exempt therefrom by statute; Walker v. Trans. Co., 3 Wall. (U. S.) 150; or that permits a person to commit acts of trespass upon others' property; Waters v. Lilly, 4 Pick. (Mass.) 145; or permits an individual to appropriate to his exclusive use, rights which belong equally to all the public; Freary v. Cook, 14 Mass. 488; or which permits a person to take anything from another's land, Perley v. Langley, 7 N. H. 233. A custom to take fish, or to take sand from another to make mortar *in alieno solo*, is void. Waters v. Lilly, *ante;* Lupkin v. Haskell, 3 Pick. (Mass.) 356; Littlefield v. Maxwell, 31 Me. 134, or to take another's property; Wadley v. Davis, 63 Barb. (N. Y.) 500; or that permits an intermediate carrier to deduct from back freight carried, any deficiency in the cargo as shown by a comparison of the bill of lading with the measurement of the carrier receiving it; Strong v. G'd Trunk R. R. Co., 15 Mich. 206; or which continues the liability of a

to deal with the property of the principal as his own,[136] or negligently,[137] or to charge an arbitray commission for services,[138] or

carrier after his liability is discharged by the general law: Reed v. Richardson, 98 Mass. 216; or which permits an agent to warrant the quality of goods sold by him, although not authorized to do so by his principal: Dodd v. Farlow, 11 Allen (Mass.), 426; or to ascertain the quantity by measurement, where the articles are sold by the dozen, hundred or thousand, instead of by count; Sweeney v. Thomason, 9 Lea (Tenn.), 359; 42 Am. Rep. 376. There may be some doubt in the accuracy of this doctrine, and an examination of the case will show that really there was no proof of such a usage as was claimed, and there was direct proof that the defendant never heard of the usage, and from the circumstances there was no ground for a presumption that he knew of it. The contract was for brick by the thousand "in the wall," and the usage claimed, was to ascertain the number by measurement, instead of by count. In Smith v. Wilson, 3 B. & Ad. 728, it was held that the word "thousand, used in a lease in reference to rabbits, might be shown to mean twelve hundred. See also Miller v. Stevens, 100 Mass. 515; and Heald v. Cooper, 8 Mo. 32, all of which are opposed to Sweeney v. Thompson *supra*. See also Merick v. McNulty, 26 Mich. 374, where it was held proper to admit proof of a usage to reject fractions of a foot in measurement, and Brooks v. Brooks, 25 Penn. St. 210, where it was proof of a usage that where lumber is sold by the "thousand feet," lineal measure is intended, and Soutier v. Kellerman, 18 Mo. 509, where evidence of a usage was admitted to show that *two packs* of shingles make 1,000; or any custom or usage that originates in, or is continued by oppression or fraud, or is contrary to the policy of the laws, morality and religion, is void, and cannot be set up either to protect rights acquired under, or to defeat rights acquired in opposition to them. Holmes v. Johnson, 42 Penn. St. 159.

[136] A custom is to be considered unreasonable if it be opposed to the policy of the law, as where it tends to unsettle settled rules of law established for the protection of the rights of the parties. So a local custom of insurance agents that on closing the agency they should cancel and take up all policies paid for if they see fit on the theory that the business they had worked up and secured during their agency belonged to them personally is invalid. Merchants' Insurance Co. of Newark v. Prince, 50 Minn. 53, 36 Am. St. Rep. 626; 52 N. W. 131. So a drummer cannot prove a custom to indorse checks made payable to his principal in payment of goods, in the absence of express authority. Jackson v. National Bank of McMinnville, 92 Tenn. 154, 20 S. W. 802; 36 Am. St. Rep. 81. A custom for a color mixer employed by a carpet manufacturer to keep as his exclusive property title to the various shades of colors devised by him for use in the manufacture of carpets in his employer's mill is unreasonable and void. Dempsey v. Dobson, 184 Pa. State. 588, 39 A. 493; 63 Am. St. Rep. 809. Evidence of a local custom by factors engaged in the produce business of making weekly settlements on a basis of bills payable by and to them both as factors and principals is not binding upon the principal as it is a custom to permit an agent to appropriate his principal's property to the payment of his own debt which is contrary to well established principles of law. Baxter v. Sherman, 73 Minn. 434, 76 N. W. 211; 72 Am. St. Rep. 631.

[137] A custom of bankers to surrender an obligation for the payment of money to the obligor upon the receipt of a check given for its payment is unreasonable and cannot be invoked by an agent as a justification for his course in dealing with an obligation belonging to his principal. National Bank of Commerce v. American Exchange Bank, 151 Mo. 320, 52 S. W. 265; 74 Am. St. Rep. 527.

[138] A custom in order to be valid

where it in any other way contraveves the substantive law, as by giving one a right to take from,[139] or dump on real property of another.[140]

J. Usage as a Means for ascertaining the Meaning of Words and Phrases.

While, generally, words are used in contracts in their ordinary sense, yet it is a matter of common knowledge that in a particular trade or business, words having a well understood meaning in ordinary transactions have acquired a technical sense entirely different from their ordinary signification, so that if in that class of contracts the words were to be given their ordinary interpretation, the intention of the parties would be wholly subverted. So, too, there is a class of words which are purely local or technical which are used in a particular locality or science or trade, and very often the same words which have a common and universal meaning, also acquire a local or technical significance, and in either case evidence of usage is admissible to explain the local, technical or peculiar meaning in the trade or business to which the contract relates, provided sufficient is proved to raise a presumption that the parties intended to use the words in their technical or peculiar sense, or the fact can be inferred from reading the contract itself. It may be stated, as a general rule, that oral evidence is always admitted to show the sense in which, according to the custom of merchants, a mercantile contract is to be understood,[141] and in

must be reasonable, and so a custom which gives a real estate broker five per cent. of the purchase price of land for assisting in its sale irrespective of the amount, value or character of the services rendered is unreasonable and void. Penland v. Ingle (N. C., 1905), 50 S. E. 850. This case is hardly law, in most jurisdictions, see Cook v. Welch, 9 Allen (Mass.) 350.

[139] Evidence of a local custom as to the rights of a prior appropriator of running water contrary to the common law is held inadmissible in Kansas. Clark v. Allaman (Kan., 1905), 80 Pac. 571; *contra*, Isaacs v. Barber, 10 Wash. 124, 38 P. 871; 45 Am. St. Rep. 772. The custom to fish in a stream not navigable flowing through the land of another is immaterial as it is not a lawful custom, being one to take from land of another. Such a right can be available only by prescription. Beach v. Morgan, 67 N. H. 529, 41 A. 349; 68 Am. St. Rep. 692.

[140] A custom of coal operators to dump slack on their land in such a way that it may wash upon the land of another is no defense to an action by one injured by such a practice as it is in violation of the land-owner's common law right. Columbus, etc. C. & I. Co. v. Tucker, 48 Ohio State, 41, 26 N. E. 630; 29 Am. St. Rep. 528.

[141] Wigglesworth v. Dallison, 1 Smith's L. C. *n*.

such cases it is unobjectionable to ask a witness whether there is any generally understood meaning of certain words among persons engaged in the particular trade or business under consideration,[142] and indeed it would seem that such a question must be put to the witness before he is asked what he understands by the written contract to which it is meant to apply the usage.[143] A question as to the meaning of a certain phrase in a certain business is inadmissible without proof that the phrase had a definite trade meaning.[144] Thus the words "fur,"[145] "freight,"[146] "weeks,"[147] "days,"[148] "thousand,"[149] "level,"[150] "inhabitant,"[151] "roots,"[152] "building,"[153] and many other words which it would not be profitable to enumerate have been interpreted by extrinsic evidence, although *prima facia* they presented no ambiguity, and their peculiar meaning when found in connection with the subject-matter of the transaction has been fixed by parol testimony of the sense in which they are *usually* understood when employed in cases similar to that under investigation.

[142] Robertson v. Jackson, 2 C. B. 412.

[143] Curtis v. Pack, 13 W. R. 230.

[144] Chase v. Ainsworth, 135 Mich. 119, 97 N. W. 404.

[145] Aster v. Union Ins. Co., 7 Cow. (N. Y.) 202.

[146] Peisch v. Dickson, 1 Mas. (U. S.) 11; Lewis v. Marshall, 7 M. & G. 729.

[147] Grant v. Maddox, 16 L. J. N. S. Exch. 227.

[148] Cochran v. Retbery, 3 Esp. 121

[149] Smith v. Wilson, 3 B. & Ad. 728

[150] Clayton v. Gregson, 5 Ad. & El. 302.

[151] Rex v. Mashiter, 6 Ad. & El. 153.

[152] Coit v. Commercial Ins. Co., 7 John. (N. Y.) 385.

[153] Livingston v. Ten Broeck, 16 id. 14. A contract of hiring may be qualified by proof of customary holidays; Rex v. Stoke-upon-Trent, 5 Q. B. 303; a sack of hops at 100*s.* may be explained to mean £5 *per cwt.*; Spicer v. Cooper, 1 Q. B. 424; a contract for the sale of cider may be explained, by local usage, to mean apple juice before it has been made into cider in its usual form. Studdy v. Sanders, 5 B. & C. 628. So parol evidence has been admitted to prove the meaning of the word "privilege" in a contract between ship-owner and captain; Birch v. Depuyster, 4 Camp. 385; of the meaning of "mess pork" in a contract of sale; Powell v. Horton, 2 N. C. 668; of the words "across the country" in a wager on a race; Evans v. Pratt, 3 M. & G. 759; of the meaning of the word "bale," and the quantity usually contained therein, in contracts for the sale of articles by the bale; Gorrissen v. Perrin, 2 C. B. N. S. 681; Taylor v. Briggs, 2 C. & P. 525, and, in a New Jersey case, Smith v. Clayton, 29 N. J. L. 357, a lease of premises contained a provision that "should the said A. sell the last-mentioned lot at any time after the said C. has planted the same, he shall have the privilege of sowing *grain* on the same. The lessor having sold the land after C. had planted the land, he sowed oats on the corn ground the succeeding spring, and the question was whether he was not restricted to the sowing of winter grain. The court held that evidence of the meaning of the word "*grain*," as used in common parlance, was not admissible, but that it was the duty of the court to determine its meaning. But that parol evidence of the meaning of a word

Technical terms used in a building contract may be explained by parol.[154] The expression "square 3000 pine saw logs" may be explained to the court in view of local custom and meaning.[155] Evidence is admissible to show that the word "noon" in a fire in-

that is ambiguous or made so by evidence, may be shown. See Hart v. Hammett, 18 Vt. 127; Patch v. Ins. Co., 44 Vt. 481; Collender v. Dinsmore, 55 N. Y. 204; Collins v. Driscoll, 34 Conn. 43; Avery v. Stewart, 2 Conn. 69; Eaton v. Smith, 20 Pick. (Mass.) 150; Walls v. Bailey, 49 N. Y. 464; Taylor v. Sotolingo, 6 La. An. 154; Galena Ins. Co. v. Kupfer, 28 Ill. 332; Drake v. Gorce, 22 Ala. 409; Hooper v. R. R. Co., 27 Wis. 81; Soutier v. Kellerman, 18 Mo. 509; Johnson v. Ins. Co., 39 Wis. 87; Fitch v. Carpenter, 43 Barb. (N. Y.) 50; Wait v. Fairbanks, Gray (Vt.), 77; Stewart v. Smith, 28 Ill. 397; Jenny Lind Co. v. Bower, 11 Cal. 194; Reynoulds v. Jourdan, 6 Cal. 108; Dent v. Steamship Co., 49 N. Y. 320; Schnitzer v. Print Works, 114 Mass. 123; Page v. Cole, 120 Mass. 37; Howard v. Ins. Co., 109 Mass. 387; Murray v. Hatch, 6 Mass. 465. So usage has been admitted to show what was meant by the word "team" (Granson v. Madigan, 15 Wis. 144); to show what was meant by the words "all faults," in a contract where certain property was sold "with all faults," and generally where it is shown that a word has acquired a special or technical meaning in a certain trade, it may be shown, because it is presumed that every person conducting such trade uses the language of the trade, and makes his contracts in conformity with the sense in which such language is therein employed. Whitney v. Boardman, 18 Mass. 44; Carter v. Coal Co., 77 Penn. St. 286; Meighan v. Bank, 25 id. 288. And the same rule prevails where words are used in a peculiar sense in a certain district or locality. Pope v. Nickerson, 3 Story (U. S.), 465; Trimble v. Vignier, 1 Bing. (N. C.) 151; De La Viga v. Vianna, 1 Br. Ad. 284; De Wolfe v. Johnson, 10 Wheat (U. S.) 367; Clayton v. Greyson, 5 Ad. & El. 502; Aben v. Carson, 62 Mo. 207. The usage of a trade is admissible to fix the exact liability of the parties in cases where the contract is silent in that respect, and the law has fixed no definite standard. Thus, in a contract by which A. agrees to work for B. ten days, at $2.50 a day, the contract seems definite enough; but A. has really worked 120 hours, and the question is, has he worked *more* or *less* than ten days? If he has worked *more* than that number of days, he is entitled to additional pay in the proportion that the excess bears to the price per day; if *less*, then B. is entitled to a proportionate deduction. The law has fixed no definite standard, therefore usage is the only instrumentality that can be brought in to solve the question, and the courts admit it. Hinton v. Locke, 5 Hill (N. Y.), 437. So to show what is meant by the words "weeks," "months," etc., in a certain class of contracts. Grant v. Maddox, 15 Moll. 737; Jolly v. Young, 1 Esp. 186. So, too, where certain work, as "plastering" a house, or "laying a cellar wall," etc., is to be done at so much per square yard, evidence of the usage of plasterers, in the locality where the contract was made, has been held admissible to determine whether, in ascertaining the quantity, the whole sides of the house should be measured as solid, or whether allowances should be made for openings of windows and doors. The courts justly hold that contracts of this character are ambiguous to the extent that evidence of the usage of the trade is admissible to ascertain the true method of measurement and the number of yards, etc., that should be paid for, provided the usage is not unreasonable. Walls v. Bailey, 49 N. Y. 467; Ford v. Tirrell, 9 Gray (Mass.), 401; Lowe v. Lehman, 15 Ohio St. 179.

[154] Cannon v. Hunt (Ga.), 42 S. E. 734.

[155] Hinote v. Brigman, 44 Fla. 589, 33 So. 303.

surance policy according to a general local custom referred to twelve o'clock mid-day standard time rather than twelve o'clock "sun time." The custom here was a general custom not confined to any particular part of the community.[156] Where a memorandum for the sale of goods relied upon to take a transaction out of the statute of frauds speaks of the goods as "2000 lbs. F. C." parol evidence is admissible to show that the letters F. C. are technical abbreviations used in the wool trade to designate a certain kind of wool.[157]

But a certain deed covering "mineral and ores" cannot be explained by evidence that the parties intended to cover only iron ore and that the word minerals was understood in the vicinity to mean iron ore where a settled and recognized usage to this effect is not proved.[158] A description of land in a township "E² N W¼" is insufficient as not being in common language and evidence is inadmissible of the local custom to describe property in this way and of the meaning of the description even though the usage claimed is a general usage throughout the State among those dealing in real estate.[159] It may be stated as a general rule, that *where a word or phrase used in a contract is susceptible of two or more meanings, extrinsic evidence is admissible to ascertain in which sense it was employed by the parties*, and if a usage exists by which the words, in the trade to which the contract relates, have acquired a definite meaning, that is regarded as the real exponent of the true intention of the parties.[160]

[156] Rochester German Ins. Co. v. Peaslee Gaulbert Co. (Ky., 1905), 87 S. W. 1115.

[157] New England, etc. Co. v. Standard, etc. Co., 165 Mass. 328, 43 N. E. 112; 52 Am. St. Rep. 516.

[158] Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186; 49 Am. St. Rep. 683.

[159] Power v. Bowdle, 3 N. D. 107, 54 N. W. 404; 44 Am. St. Rep. 511.

[160] Bottomley v. Forbes, 5 Bing. (N. C.) 121; Journu v. Bordieu, Park on Ins. 245; Mason v. Skurry, id. 245; Mackenzie v. Dunlop, 3 Maeg. (S. C.) 26; Buckle v. Knook, 2 L. R. Exchq. 125. And in the same manner the meaning of certain phrases is ascertained. Thus the phrases "coppered ship," Hazard v. N. E. Marine Ins. Co., 1 Sum. (U. S.) 218, "store fixtures," Whitmarsh v. Conway F. Ins. Co., 16 Gray (Mass.), 359. "British weight," Goddard v. Bulver, 1 N. & M. (S. C.) 45; "immediate delivery," Nelson v. Smith, 36 N. J. L. 148; "a clear bill of lading," Cheny v. Holly, 14 Wend. (N. Y.) 26; Barber v. Bruce, 3 Conn. 9; "warranted to depart with convoy," Lethutier's case, 2 Salk. 443; "sea litter," Sleight v. Hartshorne, 2 John. (N. Y.) 531; "the tanning business," Barger v. Caldwell, 2 Dana (Ky.), 130; "in regular turns of loading," Schultz v. Leidman, 146 C. B. 38; "after arrival" at a certain place, may be shown to mean at a place at sea, several miles from certain ports, if it be a place of ordinary anchorage. Lindsay v. Jauson, 4 H. & N. 699. So where by a charter

K. Rule when Words have well defined Meaning.

Usage is not admissible to contradict or vary what is plain;[161] therefore, *if the words employed in a written contract or instrument have a known legal meaning,* parol evidence that the parties intended to use them in some different, though popular sense, will

party the ship-owner agreed to consign the ship to A. B., at Calcutta, "on the usual and customary terms," a custom may be proved for consignee to procure the homeward freight on commission, Robertson v. Wait, 8 Exch. 299; but where the charter provides that the consignment was to be "free of commission," and says nothing of usual terms, the charterer cannot set up such custom by oral evidence in an action against the ship-owner for not allowing the consignee to procure the homeward freight. Phillips v. Briard, I H. & N. 21. "A full and complete cargo of sugar" may be explained to mean full and complete according to the customary mode of packing and loading sugar at the port where it is loaded. Cuthbert v. Cumming, 11 Exch. 405. "In turn to deliver," may be explained by local usage. Leidemann v. Schultz, 14 C. B. 318; Robertson v. Jackson, 2 C. B. 412. So the custom of the port as to when lay days commence. Norden Steam Co. v. Dempsey, 1 C. P. D. 654. "Fifty tons best palm oil, with a fair allowance for inferior oil, if any," may be explained to be satisfied by the delivery of fifty tons, of which the greater part is inferior. Lucas v. Bristow, E. B. & E. 907; 27 L. J., Q. B. 364. A contract in writing to do stone and brickwork at the rate of "3*s.* per superficial yard of work 9 inches thick, and finding all materials, deducting all lights," was held not to exclude a custom in the trade to reduce all brickwork for the purpose of measurement to 9 inches in thickness Symonds v. Floyd, 6 C. B., N. S. 691. So a contract to do certain work and to deliver "a weekly account of work done" was held not inconsistent with a usage in the building trade, that this clause related not to all the work contracted to be done, but to that part only which was of a particular kind. Myers v. Sarl, 3 E. & E. 306. Where there was a written contract for the sale of shares at a certain price, "for payment half in two, half in four months," it was held, that evidence was admissible that the seller was by usage not bound to deliver the shares until the appointed time for payment unless the buyer chose to pay for them earlier. Field v. Lelean, 6 H. & N. 627, Ex. Ch. The usage of a particular port, that the underwriters are not liable for general average in respect of the jettison of timber stowed on the deck, can be annexed to a policy making the underwriter liable for general average without restriction. Miller v. Tetherington, 6 H. & N. 278; 7 H. & N. 954. By a bill of lading of wool, freight was to be paid "at the rate of 80*s.* per ton of 20 cwt. gross weight, tallow and other goods, grain or seed, in proportion as per London Baltic printed rates;" evidence was admitted to show that by the usage of the trade this meant that 80*s.* per ton of 20 cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured. Russian S. Navigation Trading Co. v. Silva, 13 C. B., N. S. 610. The question whether a cargo "for shipment in June" was satisfied by a cargo which was loaded half in May and half in June, was held to be a question for the jury. Alexander v. Vanderzee, L. R., 7 C. P. 530. So, on a sale of goods to be paid for in from "six to eight weeks," the question of the length of credit thereby allowed was left to the jury, the words, apart from usage, being insensible. Ashford v. Redford, L. R., 9 C. P. 20.

[161] Blackett v. Royal Exchange Ins. Co., 2 Cr. & J. 249.

not be received, *unless the words, if interpreted according to their strict legal acceptation, are wholly insensible either to the context of to the extrinsic facts.* Thus, if a word denoting weight, measure or number has had a definite meaning attached to it by the legislature, parties using the word in a contract will be conclusively presumed to have used it in that sense, unless the contrary clearly appears from some part of the writing itself,[162] or from proof of a well established usage of the trade or business to which the contract relates.[163] But to be admissible under such circumstances, the usage must be clear, cogent and irresistible.[164] The fact that words of themselves are susceptible of an interpretation apparently consistent with the intention of the parties, does not exclude such proof. If the words are shown to have acquired a well-known technical meaning, that will be taken to be the sense in which they were used.

Whatever the courts may *say* as to the introduction of evidence of a usage that conflicts with the well settled rules of law, it will be found in practice, and by a careful examination of the cases, that the rule exists in theory rather than in practice, and that the rule is really nothing more or less than that *evidence of a usage that*

[162] Henry v. Rusk, 1 Dall. (U. S.) 465; Frith v. Barker, 2 John. (N. Y.) 335; Stower v. Whitman, 6 Binn. (Penn.) 417.

[163] Miller v. Stevens, 100 Mass. 518.

Thus, in the case last cited parol evidence was admitted to show that in a contract for a certain number of "barrels" of petroleum, at so much a gallon, the word "barrel" means a vessel of a certain capacity, and not the statutory measure of quantity, and that for this purpose evidence that petroleum oil is often sold in barrels, and that the barrels are usually of such certain capacity, is competent, as also that the barrels exhibited by the seller at the time of his offer to deliver, some two months after the date of the contract, were of such capacity; also that the purchaser, in all the discussions relating to the delivery, did not suggest that the barrels were not what the contract required, and was ready to receive the barrels if he had considered the oil of the requisite quality.

[164] Spicer v. Cooper, 1 Q. B. 424; Allegre v. Maryland Ins. Co., 2 G. & J. (Md.) 136.

Thus, in replevin for marble retained by the carrier for the costs of transportation, the question in dispute was, whether marble in slabs was wrought or unwrought, the charge for the former being more than for the latter. Evidence being heard, the court instructed the jury "that the terms 'wrought' and 'unwrought,' as applied to marble, are words of doubtful signification, and it was competent for the plaintiff to show what meaning is given to them by custom and usage; that such custom, in order to bind the defendant, need not be universal, settled or uniform among dealers and carriers. If the jury believe from the evidence that the generally prevailing usage among manufacturers, dealers and carriers is to class and consider marble in slabs as unwrought, then the defendant can claim freight on it only as of that class." It was held that the jury were properly instructed. Bancroft v. Peters, 4 Mich. 619.

conflicts with a well-settled rule of law must be of such a character as to afford irresistible evidence that the parties knew of and contracted in reference to the usage rather than in reference to the rules of law, and that where nothing more than mere proof of a usage exists, and the parties' knowledge thereof, it will be presumed that the parties contracted in reference to the law rather than the usage.[165] A contrary rule would overturn a well-settled rule that parties may waive the provisions of the common law or a statute even, and contract in direct opposition thereto, unless the statute prohibits such a contract, or it is *malum in se* or opposed to the policy of the law. Therefore there can be no question but that *in all cases where the parties may expressly contract in opposition to the common law or a statute, evidence of a usage may be given to show that the parties contracted in reference to it rather than in reference to the law,* and it is a question of fact for the jury to find whether the parties did or did not intend to adopt the usage instead of the law.[166] Of course, limitations upon this rule exist, and cases often arise in which the courts will adjudge the usage absolutely void in itself, and it may be said, with absolute certainty, that if that which is sought to be incorporated into the contract by usage would be void, as an express stipulation, the evidence would not be admissible. Therefore a usage *malum in se* or *malum prohibitum,*[167] or which trenches upon the policy of the law, as in restraint of trade,[168] or which is unreasonable, unjust, oppressive, or which sanctions dishonesty, is clearly void,[169] and never could obtain recognition from the courts.

So when a word has a settled popular meaning and the contract is unambiguous on its face it is said that parol evidence of a custom to vary it is inadmissible.[170] Thus evidence is inadmissible to explain the meaning of the words "at the gate" by a local custom or usage where the words appear in a contract for water, the

[165] Adams v. Pittsburgh Ins. Co., 76 Penn. St. 411; Jones v. Wagner, 66 id. 429; Miller v. Stevens, *ante;* Overman v. Hoboken Bank, 30 N. J. L. 61.

[166] Gorden v. Little, 8 S. & R. (Penn.) 533; Halsey v. Brown, 3 Day (Conn.), 346; Snowden v. Warder, 3 Rawle (Penn.), 101; Renner v. Bank of Columbia, 9 Wheat. (U. S.) 581; Jones v. Fales, 4 Mass. 245.

[167] Snowden v. Warder, 3 Rawle (Penn.), 107.

[168] Williams v. Gilman, 3 Me. 281.

[169] Gallatin v. Bradford, 1 Bibb. (Ky.) 209; Whitesides v. Meredith, 3 Yeates (Penn.), 318; Kendall v. Russell, 5 Dana (Ky.), 501.

[170] Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co., 97 Md. 1, 54 A. 634.

expressions of which appear to be perfectly plain.[171] A contract by which a base ball player is hired for a definite period cannot be varied by evidence of a general custom existing in the business to discharge a player on giving ten days' notice on account of inefficiency in his playing.[172] Where a contract provides for the delivery of coal or goods free from any expense or duty evidence is inadmissible of a custom at the port of delivery that any change of duty between the date of the contract and the delivery shall operate to the advantage of the purchaser (under the code providing for evidence of usage only to explain ambiguous contracts).[173] Where a lessee had a right to drill for "petroleum oil or gas" evidence was excluded to show that in such contracts the word "gas" means gas derived from a gas well and not from an oil well. The court remarks that that evidence contradicts rather than explains the contract.[174]

L. Usage may add Incidents to Contracts. Illustrations.

The office of a usage is not confined to that class of cases where the written instrument is expressed in ambiguous or technical language, but is also admissible, in many instances, *to add incidents* to the contract, that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which it relates, which are not inconsistent therewith.[175] This species of evidence is admitted upon the principle of presumption that the parties did not mean to express the whole of the contract in writing, but made it in reference to the usage, and in such cases the usage is as much a part of the contract as though it had actually been incorporated therein.[176] A good illustration of this rule is to be found in the commercial usage, by which grace is allowed upon a note or bill of

[171] Cummings v. Blanchard, 67 N. H. 268, 36 A. 556, 68 Am. St. Rep. 664.

[172] Baltimore Base Ball Club, &c., Co. v. Pickett, 78 Md. 375, 28 A. 279, 44 Am. St. Rep. 304.

[173] Withers v. Moore, 140 Cal. 591, 74 Pac. 159.

[174] Burton v. Forest Oil Co., 204 Penn. 349, 54 A. 266.

[175] Dixon v. Dunham, 13 Ill. 324; Thompson v. Hamilton, 12 Pick. (Mass.) 425; Cooper v. Kane, 19 Wend. (N. Y.) 386; Leach v. Beardslee, 22 Conn. 404; Alabama, &c., R. R. Co. v. Kidd, 29 Ala. 221.

[176] Palmer v. Kane, 5 Wis. 265; Bank of Columbia v. Fitzhugh, 1 H. & G. (Md.) 239; Harsh v. North, 40 Penn. St. 241; United States v. Arrendo, 6 Pet. (U. S.) 715; Stultz v. Dicky, 5 Binn. (Penn.) 287; Barber v. Bruce, 3 Conn. 9; Sewall v. Gibbs, 1 Hall (N. Y.), 612; Ludwick v. Ohio Ins. Co., 5 Ohio, 436; Sampson v. Gazzam, 6 Port. (Ala.) 123.

exchange, payable at a certain time. Thus, a note is made payable in sixty days from date, but commercial usage steps in and postpones the payment for *three* days, making it payable only in *sixty-three* days, and, in cases where this usage applies, it is so effective, that a suit brought or protest made before the lapse of the sixty-three days is entirely inoperative. In these cases the parties are presumed to contract in reference to the law as it exists at the time, and the only difference between taking that and a usage is, that the latter is a binding law on particular persons, places and things; and although there are some exceptions, yet, in many cases, the maxim, *Expressum facit, cessare tacitum,* applies as well to an *incident,* sought to be annexed to a contract by the general law, as by a special custom or usage.[177] So, too, it may be proved by parol that it is the custom of persons employed in particular trades, under a general contract of hiring, to have certain holidays in the year, and Sundays to themselves.[178] So that a tenant by deed is entitled to the away-going crops, although no such right is reserved in the deed,[179] or that an "exclusive agent" is entitled to commissions on all sales made by anyone in his district.[179a]

This rule, however, as well as in all instances in which evidence of usage is received, is subject to the qualification that *the evidence must not be inconsistent with or repugnant to the contract;* for otherwise it would not go to interpret, but to contradict what is written.[180] In order to establish an inconsistency between the written agreement and the usage or custom, it is not necesary that the former should, in express terms, exclude the latter, but if it can be collected from the whole instrument, either expressly or impliedly, that the parties did not mean to be governed by the usage, no evidence respecting it can be received.[181] *Prima facie* every

[177] Cherry v. Holly, 14 Wend. (N. Y.) 26; Avery v. Stewart, 2 Conn. 69; Dana v. Fulden, 1 E. D. S. (N. Y. C. P.) 463; Lawrence v. McGregor, 37 Penn. St. 192; Boorman v. Johnson, 12 Wend. (N. Y.) 566; Wilcox v. Wood, 9 id. 349; Daggett v. Snowden, 2 Black. (U. S.) 225; Crosby v. Wyatt, 23 Me. 156; Fox v. Parker, 44 Barb. (N. Y.) 541; Foley v. Mason, 6 Md. 37.

[178] Rex. v. Stoke-upon-Trent, 5 Q. B. 303.

[179] Wigglesworth v. Dallison, 1 Doug. 210; Senior v. Armitage, Hatt. 197; Hutton v. Warren, 1 M. & W. 466.

[179a] Garfield v. Peerless Motor Car Co., (Mass., 1905), 75 N. E. 695, *contra* Golden Gate Packing Co. v. Farmer's Union, 55 Cal. 606.

[180] Trueman v. Loder, 11 Ad. & El. 589; Holding v. Pigatt, 7 Bing. 465; Yates v. Pym, 6 Taunt. 446; Clarke v. Rayston, 13 M. & W. 752.

[181] Hutton v. Warren, 1 M. & W. 477; Webb v. Plummer, 2 B. & Ad. 746.

contract is to be understood as containing, in some sort, an implied reference to the general law; but when a state of facts is made out, which rebuts that presumption, and shows that the parties intended to adopt a particular usage as the rule of interpretation, the latter will prevail, provided it is such a usage as the parties had a right to adopt. But it is obvious, that *where the contract itself manifests an intention, either directly or indirectly, to exclude the usage,* no evidence of it can be received, without overstepping the limits of exposition. A custom or usage of trade is only allowable as one mean to arrive at the intention, never to thwart or control it. If the stipulations of a contract indicate an *intention* in the obligor, variant from the usage, then the stipulations should prevail; otherwise, an obligation may be imposed contrary to the intention, through provided against by the express terms of the contract.[182] What will be deemed such an expression of intention, inconsistent with the usage, as to exclude the latter, is many times a question of considerable difficulty. The general rule is clear; no extrinsic evidence of usage can be received to vary, add to, or contradict the plain sense of the contract, when once properly ascertained.[183] But the application of it depends so much upon particular forms of expression, and terms in the contract, which may happen to strike different minds in different ways, as well as upon various collateral and intrinsic circumstances, that it is not extraordinay to find learned judges disagreeing somewhat on this point. That disagreement, as we have seen, is most strikingly apparent in those cases where usage has been invoked to supersede some rule of general law. Then the presumption that the parties contracted in reference to the general law, must be overcome, before the usage can be applied; and very slight indications of intent, appearing in the instrument, have been seized upon as corroborating that presumption, to the extent of excluding the usage altogether. There are various usages of trade and commerce, which have been so often proved as matters of fact, and have so

[182] Kendall v. Russell, 5 Dana (Ky.), 501, 502. See *per* STORY, J., in Schooner Reeside, 2 Sum (U. S.) 570.

[183] Mumford v. Hallett, 1 John. (N. Y.) 439; Rankin v. The American Ins. Co., 1 Hall (N. Y.), 619; The Schooner Reeside, 2 Sum. (U. S.) 56; Turney v. Wilson, 7 Yerg. (Tenn.) 540; Stoever v. Whitman, 6 Binn. (Penn.) 516; Turner v. Burrows, 5 Wend. (N. Y.) 541, 547; Parsons v. Miller, 15 id. 562; Snowden v. Warder, 3 Rawle (Penn.), 107; Yeates v. Pim, 2 Marsh. (Ky.) 141; Blackett v. Royal Exchange Ins. Co., 2 Cr. & J. 244.

far incorporated themselves with the general law, that courts will judicially recognize them.[184] But particular usages, such as those of which we have been speaking, must be proved specially. And the circumstances of the usage being *prima facie* "unreasonable," "against the general law," "restricted within very narrow limits," of comparatively "recent origin," etc., etc., always come in to enhance the difficulty of showing that the parties contracted in reference to it, and intended to make it the law of their case.[185] And perhaps this is the sense in which many cases are to be understood, which lay down the proposition that *a usage, to be obligatory, must be certain, uniform, reasonable, and sufficiently ancient to be generally known.*[186]

When the question is of a custom or usage, and it is not known to those who, from their business and connections, have the best means of knowing it, ignorance of it is, in some sense, positive testimony of its non-existence. Thus, suppose the question to be as to the existence of a usage of trade in a foreign port, according to which the rights of parties are to be decided, and that there are two foreign witnesses, both merchants belonging to the place and dealing in the same business, one of whom testifies in support of the usage, and the other is ignorant of it, in such case it seems the usage cannot be said to be proved, especially if other merchants from the place are in court and not called on.[187] So, too, the fact that a usage has been resisted by some, and those insisting upon it or others of the same class consenting to a qualification or abandonment of it in consequence of such resistance, is quite material on the general inquiry.[188] There is a distinction between inquiring of a witness for the common understanding as to the import and effect of a contract susceptible of a clear interpretation, and an inquiry merely as to the custom or usage relating to such contract. The former would be inadmissible, and the latter is admissible,

[184] Consequa v. Willings, 1 Pet. (U. S. C. C.) 230; Snowden v. Warder, 3 Rawle, 105; Wilcox v. Wood, 9 Wend. (N. Y.) 349; United States v. Horrendo, 6 Pet. (U. S.) 715; Thomas v. O'Hara, 1 Const. Ct. (S. C.) 306.

[185] Gibson v. Culver, 17 Wend. (N. Y.) 307; Wilcox v. Wood, 9 id. 349; Middleton v. Heyward, 2 N. & McC. (S. C.) 9; Gordon v. Little, 8 S. & R. 535; Eager v. Atlas Ins. Co., 14 Pick. (Mass.) 143, 4; Snowden v. Warder, 3 Rawle (N. Y.), 105; Thomas v. O'Hara, 1 R. Const. Ct. (S. C. 306; Furnis v. Hone, 8 Wend. (N. Y.) 266; Allegre v. The Maryland Ins. Co., 2 G. & J. (Md.) 136.

[186] Kendall v. Russell, 5 Dana (Ky.), 501.

[187] Parrott v. Thatcher, 9 Pick. (Mass.) 420.

[188] Kendall v. Russell, *ante.*

if at all, as a means of interpreting the sense in which the parties understood the language, while the former only shows the understanding of others, which is immaterial, *unless it was also the understanding of the parties.*[189]

M. Rule when Ambiguity is Created by Parol Proof.

There is a class of cases, as we have seen, where evidence of usage is admissible to put a construction upon a contract, in which there is no ambiguity upon its face, but where an ambiguity is created by extrinsic evidence. This results from the circumstance that, in the ever varying and changing pursuits of mankind, new terms are being devised, among mechanics, manufacturers and professional men, which, although they may have a well understood meaning in ordinary transactions, yet have a peculiar and entirely different meaning in the trade or business to which they relate, and there can be no rational objection to the admission of parol evidence of persons conversant with their technical meaning, to explain them,[190] and, although there are a class of cases which hold that this should not be permitted, where the usage conflicts with a statutory definition,[191] yet the present drift of authority is the other way, where the usage is not *malum prohibitum*. If the usage is inconsistent with the contract, or expressly or by necessary inference contradicts it, it cannot be received in evidence to explain it,[192] because in such a case the effect of the usage would be to thwart, rather than effectuate the intention of the parties,[193] and a usage is never admissible to change the legal relation of the parties, or defeat their intention.[194]

[189] Paull v. Lewis, 4 Watts (Penn.), 402; Houghton v. Gilbert, 7 C. & P. 701. In this case the question was as to the meaning of the word "cargo," in reference to a ship, and whether it included the whole loading. The counsel was proceeding to read from Entick's Dictionary when TINDAL, C. J., stopped him and said: "It is a question of mercantile construction, you had better lay aside your dictionary and appeal to the knowledge of the jury, for, after all, the dictionary is not authority."

[190] Sleight v. Hartshorn, 2 John. (N. Y.) 542; Miller v. Stevens, 100 Mass. 518.

[191] Evans v. Myers, 25 Penn. St. 114; Green v. Moffatt, 22 Mo. 529.

[192] Thompson v. Ashton, 14 John. (N. Y.) 417; Robinson v. United States, 13 Wall. (U. S.) 365; Dickinson v. Gray, 7 Allen (Mass.), 9; Wetherell v. Neilson, 20 Penn. St. 448; Frith v. Barker, 2 John. (N. Y.) 327; Coxe v. Heisley, 19 Penn. St. 243.

[193] Clark v. Raystour, 13 M. & W. 752; Willtshear v. Cottrell, 1 E. & B. 674.

[194] Duguid v. Edwards, 50 Barb. (N. Y.) 288; Lawrence v. Maxwell, 6 Lans. (N. Y.) 469; Woodruff v. National Bank, 25 Wend. (N. Y.) 674.

CHAPTER III.

Presumptions.

Section 42. In general, kinds of.
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68. Official sales.
69. Payment.
70. Title to property presumed from possession.
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Sec. 42. In general. Kinds of.[1]

Presumptions are divided into two classes, *presumptions of law* and *presumptions of fact*. Presumptions of law are said to consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry, and are founded upon either the laws of nature or the experienced course of human conduct and affairs, and the connection *usually* found to exist between certain things, and are not peculiar to the law, but are shared in common

[1] See Thayer, Prelim. Treatise, pp.319-352.

with other sciences. Thus the presumption of a malicious intent to kill, from the deliberate use of deadly weapons, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed, and it is this uniformly experienced connection which leads to its recognition by the law, without other proof; the force of the presumption being strong or weak in proportion to the universality of its experience. This class of presumptions are divided into two classes, *conclusive* and *disputable*.

A presumption cannot be based upon a presumption if there is no open and visible connection out of the facts upon which the first presumption arises and the facts sought to be established by the dependent presumption. So it cannot be argued that from certain circumstances it should be presumed that a deceased party lifted a certain heavy box and that it also should be presumed that the lifting of the box caused the injury for which suit is brought.[2]

The law does not indulge contradictory presumptions in respect to the same subject-matter at the same time. So when it is shown that a decedent had custody of his will or ready access to it, shortly before his death and the will could not be found after his death, a presumption of fact arises that he has destroyed it *animo revocandi*. But where an action is brought under a statute to set aside a will duly admitted to probate as a copy of a lost will, the burden is then upon the plaintiff under the statute to show that the will was destroyed with intention to revoke it.[3]

Sec. 43. Conclusive Presumptions, what are.

Conclusive, or, as they are sometimes called, imperative or absolute presumptions of law *are rules determining the quantity of evidence requisite to support any particular averment which is not permitted to be overcome by any proof that the fact is otherwise.* They consist chiefly of those cases in which the long-experienced

[2] Globe Accident Insurance Co. v. Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486. See, also, Douglass v. Mitchell, 35 Penn. St. 440; United States v. Ross, 96 U. S. 281.

[3] Hutson v. Hartley (Ohio, 1905), 74 N. E. 197.

connection before alluded to has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal, and they have been taken by common consent, from motives of public policy, for the sake of greater certainty and the promotion of peace and quiet in the community; and for this reason all corroborative proof is dispensed with and all opposition forbidden.[1]

Belonging to this class of presumptions are those arising under statutes, as of payment, under the Statute of Limitations, after the lapse of the statutory period; or of a grant, after the requisite user, of a right or possession of lands, etc. But by far the larger class of this species of presumptions arise under the common law; as, that *every person above the age of fourteen years is acquainted with the law*;[2] also *that every sane person is conclusively presumed to contemplate the natural and probable consequences of his acts,* and this rule prevails both in criminal[3] and in civil cases.[4] So also conclusive presumptions are raised that the records of courts have been correctly made;[5] that a party to the record was interested in the suit;[6] that all the facts essential to sustain a verdict were found, although not stated in the record.[7] So, too, after twenty years it will be presumed in favor of all judicial tribunals that all persons concerned had due notice of its proceedings.[8] So, also, it is conclusively presumed that a principal is possessed of knowledge of all facts relating to a transaction which his agent acquired while engaged in it for the principal.[9] So, too, the law conclusively presumes in favor of legitimacy,[10] unless

[1] Taylor on Ev. 64, 65.

[2] 1 Hale, 42; Rex. v. Esop, 7 C. & P. 456.

[3] Rex. v. Hunt, 1 Moo. C. C. 93; Rex v. Dixon, 3 M. & S. 15; Rex v. Jones, 9 C. & P. 260.

[4] Hazen v. Lyndonville National Bank, 70 Vt. 543, 41 A. 1046, 67 Am. St. Rep. 680; Haine v. Wilson, 9 B. & C. 643; Baylis v. Lawrence, 11 Ad. & El. 925; Pontifex v. Bignold, 3 M. & G. 63; Tapp v. Lee, 3 B. & P. 371; Foster v. Charles, 6 Bing. 396.

[5] Reed v. Jackson, 1 East, 355.

[6] Stein v. Bowman, 13 Pet. (U. S.) 309.

[7] Jackson v. Pecked, 1 M. & S. 237; Harris v. Goodwyn, 2 M. & G. 405; Spieres v. Parker, 1 T. R. 141; Davis v. Black, 1 Q. B. 911.

[8] Brown v. Wood, 17 Mass. 68; Ferrer's Case, 6 Coke, 7.

[9] Fairfield Savings Bank v. Chase, 72 Me. 226; Wiley v. Knight, 27 Ala. 336.

[10] "All children begotten while their parents are living together as man and wife are presumed to be legitimate, and this presumption cannot be rebutted by showing that the wife was guilty of adultery during the period of gestation." Town of Canaan v. Avery, 72 N. H. 591, 58 A. 509.

it is shown that the husband and wife did not cohabit, or that he was impotent;[11] and the proof of non-access or impotency must be irresistible, even though the parties are living apart,[12] or the woman is living in notorious adultery.[13] But while the parties are divorced *a mensa et thoro*, children born during separation are presumed to be illegitimate.[14] So, too, an infant under the age of seven years is conclusively presumed to be incapable of committing a crime for want of discretion;[15] and under fourteen years, a male infant is presumed, on the ground of impotency, to be incapable of committing rape,[16] or even of committing an assault with intent to commit a rape.[17] A female under ten years of age is presumed to be incapable of consenting to sexual intercourse.[18] So, after the lapse of thirty years, it will be presumed that executors and other officers, selling lands as such, observed all the necessary legal formalities.[19] But this presumption does not extend beyond the intermediate proceedings. The license to sell, as well as the official character, being matters of record, should generally be proved.[20] Nor does this presumption extend to records and public documents which are supposed always to remain in the custody of certain officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for by secondary evidence;[21] nor in cases of prescription.[22] The same principle applies to the proof of the execution of wills and ancient deeds, and where these instruments are thirty years old and free from any alterations, they prove themselves; the bare production thereof is sufficient, as the subscribing witnesses are presumed to be dead; and the rule is not changed, even though it is shown that the witnesses are living,[23] or even actually in court;[24] nor, in the case of wills, by showing that the testator died within the thirty

[11] Cope v. Cope, 1 M. & R. 269; Morris v. Davis, 3 C. & P. 215.

[12] Cope v. Cope, *ante*.

[13] Rex v. Mansfield, 1 Q. B. 444.

[14] St. George v. St. Margaret, 1 Salk. 123.

[15] 1 Hale, 147; 4 Bl. Com. 23.

[16] Rex v. Jordan, 9 C. & P. 118; 1 Hale, 630; Rex v. Groombridge, 7 C. & P. 582.

[17] Rex v. Phillips, 8 C. & P. 736; Rex v. Eledrshaw, 3 id. 396.

[18] 1 Rugs, C. & M. 693.

[19] Colman v. Anderson, 10 Mass. 105; Society, &c., v. Wheeler, 1 N. H. 310; Pejepscot v. Ransom, 14 Mass. 145.

[20] 2 Ersk. Inst. 783.

[21] Hathaway v. Clark, 5 Pick. (Mass.) 490; Brunswick v. M'Kean, 4 Me. 508.

[22] Mayor of Kingston v. Horner, 1 Camp. 215; Eldredge v. Knatt, 1 id. 215.

[23] Doe v. Burdett, 4 Ad. & El. 19.

[24] Marsh v. Colnett, 2 Esp. 666.

years.[25] But it must be shown that the instrument comes from such custody as, though not strictly proper in point of law, is sufficient to raise a reasonable presumption of its genuineness,[26] and is otherwise free from suspicion.[27] The same rule extends to letters,[28] certificates,[29] receipts,[30] and all other written documents, and if the conditions before stated exist, neither the signature nor handwriting need be proved.[31] It is questionable whether this rule applies to an instrument bearing the seal of a court or of a corporation, "because," as was said by Lord TENTERDEN,[32] "although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for after such a lapse of time, yet the seals of courts and of corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed."

Sec. 44. Estoppels as Presumptions.

So, too, estoppels are ranked with conclusive presumptions, and are divided into three classes: estoppels by deed, by record, and *in pais*.[1] Estoppels by record will be found discussed under sections 222-224, *post*. A man is said to be estopped when he has done or permitted some act which the policy of the law will not permit him to gainsay or deny; and although it is sometimes said that estoppels are odious, yet, they are generally neither unjust nor absurd, but founded upon the plainest principles of equity and morality,[2] and their foundation is laid in the obligation which every man is under, to speak and act according to the truth of the case, and in the policy of the law to prevent the mischiefs which would result from uncertainty, confusion and want of confidence in the intercourse of men if they were permitted to deny that which they have deliberately and solemnly asserted and received as true. But this doctrine is guarded with great strictness, and to

[25] Doe v. Wooley, 8 B. & C. 22.
[26] Meath v. Winchester, 3 Bing. (N. C.) 200; Doe v. Samples, 8 Ad. & El. 151.
[27] Roe v. Rawlings, 7 East, 291.
[28] Bere v. Ward, 2 Ph. Ev. 204; Doe v. Buyon, 12 Ad. & El. 431.
[29] Rex v. Ryton, 5 T. R. 259.
[30] Bertie v. Beaumont, 2 Price, 308.
[31] Wynne v. Tyrwhitt, 4 B. & Ad. 377.
[32] In Rex v. Bothwick, 2 B. & Ad. 648.
[1] Co. Litt. 352*a*.
[2] TAUNTON, J., in Bowman v. Taylor, 2 Ad. & El. 291.

be operative *must* be precise and clear and certain to every intent,[3] and mutual.[4]

Sec. 45. Upon Whom Binding.

They are only binding upon the parties and their privies, and can only be taken advantage of by those who are bound by them.[1] Corporations are bound by them as well as individuals.[2] But it does not apply to the sovereign,[3] although it has been held that a State may be estopped by the acts of its legislature,[4] and a resolve of the legislature, fixing the boundaries of certain lands, has been held sufficient to estop the State from denying them.[5] And where the State has granted lands to an alien, it has been held to be estopped by its own deed from setting up the alienage of the grantee in avoidance of its deed.[6]

Sec. 46. Estoppel against Estoppel, Effect of; How may be made Available.

An estoppel against an estoppel sets the matter at large.[1] Thus, a defendant sets up a settlement as a bar to an action and the plaintiff disputes it, the plaintiff is therefore estopped to assert

[4] Carner v. Jackson, 4 Pet. (U. S.) 83; and not dependent upon doubtful inference. Rich v. Atwater, 16 Conn. 409; Lajoye v. Primm, 3 Mo. 529; Balling v. Mayor, 3 Rand. (Va.) 563. Where one Martin H. Sullivan wrote letters describing himself at times as "surviving partner of D. F. Sullivan" the defendant by addressing him in return as plain Mr. M. H. Sullivan does not admit that M. H. Sullivan is the surviving partner of D. F. Sullivan especially where M. H. Sullivan at times signed himself as "successor to" D. F. Sullivan. There could be no claim of an estoppel until the plaintiff had himself by his conduct unequivocally fixed his own status and here he left it uncertain whether he was claiming as successor, executor, or as surviving partner. Sullivan v. Louisville & N. R. Co., 128 Ala. 77, 30 So. 528.

[4] Lansing v. Montgomery, 2 John. (N. Y.) 382; Schumann v. Garratt, 16 Cal. 100; Longwell v. Bentley, 3 Grant (Penn.) Cas. 177.

[1] Griggs v. Smith, 12 N. J. L. 22; Griffen v. Richardson, 11 Ired. (N. C.) L. 439; Langer v. Fitton, 1 Rawle (Penn.), 141; Williams v. Chandler, 25 Tex. 4; Worcester v. Green, 2 Pick. (Mass.) 425. That is, privies in blood, by estate and in law. Co. Litt. 352*a*; Measure v. Noble, 11 Ill. 531; Miles v. Miles, 8 W. & S. (Penn.) 135; Decvy v. Cray, 5 Wall. (U. S.) 795; Nutwell v. Tongue, 22 Md. 419; Langston v. McKinne, 2 Murph. (N. C.) 67.

[2] Selma, &c., R. R. Co. v. Tipton, 5 Ala. 787; Hale v. Union M. F. Ins. Co., 32 N. H. 295; Little Rock & Napoleon R. R. Co. v. Little Rock & Miss. R. R. Co., 36 Ark. 663.

[3] Taylor v. Shuford, 4 Hawkes (N. C.), 116; Wallace v. Maxwell, 10 Ired. (N. C.) L. 110; Johnson v. United States, 5 Mas. (U. S.) 525.

[4] Enfield v. Permit, 5 N. H. 280.

[5] Com. v. Pejepscot, 10 Mass. 155.

[6] Com. v. Audre, 3 Pick. (Mass.) 324.

[1] Carpenter v. Thompson, 3 N. H.

that the previous account between the parties was accepted, and the defendant is estopped from asserting that it was not, with the result that the two estoppels destroy each other and set the matter at large.[2] If evidence is offered of facts which the party is estopped from proving, and no objection is made, the estoppel is waived.[3] A party relying on an estoppel must plead it *if he has an opportunity to do so,* otherwise it may be given in evidence under the general issue.[4] And if a party neglects to take advantage of an estoppel by plea or demurrer when he has an opportunity to do so, the estoppel is deemed to be waived.[5]

Sec. 47. Estoppels in pais. Equitable Estoppels.

Estoppels *in pais* are those which are not included in those by deed or record, whether they appear upon the face of a written instrument, or result from some act or omission of the party, inducing another party to act upon the faith of such acts or omissions to act, so as injuriously to affect his previous position.[1] Thus, if the maker of a note declares it to be "good" to a person who is about to purchase it, or stands by in silence when it is about to be transferred to a third person, he is thereby estopped from setting up any defense to the note which existed at that time, of which he was, or ought to have been, cognizant.[3] So, an estoppel

204; Dausen v. Johnson, 13 N. J. L. 264.

[2] Chretien v. Giron (La., 1905), 38 So. 881.

[3] Hanson v. Buckney, 4 Dana (Ky.), 251.

[4] Howard v. Mitchell, 14 Mass. 241; Lord v. Bigelow, 8 Vt. 461; Isaacs v. Clark, 12 Vt. 692; McMair v. O'Fallow, 8 Mo. 188; Woodhaven v. Williams, 3 Dev. (N. C.) L. 508.

[5] Brinsmaid v. Mage, 9 Vt. 31; Burdet v. Burdet, 2 A. & R. Mar. (Ky.) 143; Keel v. Ogden, 3 Dana (Ky.), 103.

[1] Roe v. Jerome, 18 Conn. 138; White v. Langdon, 30 Vt. 599; Allen v Winston, 1 Rand. (Va.) 65; Laski v. Goodman, 18 La. An. 294; Bowen v Buck, 28 Vt. 308; Preston v. Mann, 25 Conn. 118; Garrison v. Garrison, 29 N. J. L. 153; Forsyth v. Day, 46 Me. 176; Wyman v. Perkins, 39 N. H. 218; Cook v. Finkler, 9 Mich. 131; Rigney v. Smith, 39 Barb. (N. Y.) 383; Cocke v. Kuykendall, 41 Miss. 65; Reigard v. McNiel, 38 Ill. 400; Brown v. Wright, 17 Ark. 9; Crout v. De Wolf, 1 R. I. 393.

[3] Watson v. McLaren, 19 Wend. (N. Y.) 557; Crout v. De Wolf, 1 R. I. 393; Cloud v. Whiting, 38 Ala. 57; Drake v. Foster, 28 id. 649; Power v. Pinkerton, 1 E. D. S. (N. Y. C. P.) 30; Preston v. Mann, 25 Conn. 118; Vanderpool v. Blake, 28 Ind. 130; Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Smith v. Stone, 17 B. Mon. (Ky.) 168; Reed v. Vancleeve, 27 N. J. L. 352; Bliss v. Rollins, 6 Vt. 529. So, if a note is made payable at a particular bank, the maker is thereby estopped from denying the existence of such bank. Hall v. Harris, 16 Ind. 180; Depeur v. Bank of Limestone, 1 J. J. Mar. (Ky.) 378. So, if he gives a note

as to a boundary line may be proved by parol.[3] So it has been held that a mortgagor, who represents to a person who is about to take an assignment of it, that it is "all right," is estopped thereby from setting up the defense of usury, or denying the amount stated to be due thereon, in its inception.[4] So where property is by the owner put into the hands of a third person to be sold as his own, the real owner is estopped from setting up his ownership thereof to the prejudice of a purchaser from such third person, and, it seems, against a creditor of such third person who has attached it upon the faith of a representation to him, by such third person, that the property was his.[5] But it must be remembered that no estoppel in relation to *real estate* can be created by *verbal* contracts or admissions.[6] Enough has been said to illustrate generally what amounts to an estoppel *in pais,* and to show what must be proved to establish such an estoppel, *to wit:* 1st. That the party sought to be estopped made the representation or admission, or did the act, or omitted to do it, upon which the estoppel is based. 2d. That the party setting up the estoppel was induced to act, or to omit to act, upon the faith of such matters,[7] and, either that the party sought to be estopped *intended to mislead the other, or was guilty of such culpable negligence as may be regarded as amounting to an intention to mislead.*[8]

So, too, it must appear that the party seeking to avail himself of the estoppel is himself bound to the exercise of good faith, and must show that he acted promptly, influenced by a belief in the truth of the matter represented, and will be prejudiced if the representations are allowed to be disputed. The act must be the immediate or proximate result of the representation, as, unless induced by the belief therein to alter his position, the opposite party cannot be concluded from averring a different state of affairs.

payable to a particular corporation, he is estopped from denying that there is such a corporation. Congregational Society v. Perry, 6 N. H. 164.

[3] Thompson v. Borg, 90 Minn. 209, 95 N. W. 896.

[4] Cary v. Wheeler, 14 Wis. 281; Man v. Howland, 20 Wis. 282; Smith v. Newton, 38 Ill. 230.

[5] Drew v. Kimball, 48 N. H. 282.

[6] Gerrish v. Proprietors of Union Wharf, 26 Me. 384; Hamlin v. Hamlin, 19 id. 141.

[7] Helser v. McGrath, 52 Penn. St. 531; Austin v. Thompson, 45 N. H. 113; Morton v. Hodgdon, 32 Me. 127; Morrison v. Weaver, 16 Ind. 344; Windle v. County, 21 id. 248.

[8] Taylor v. Ely, 25 Conn. 250; Combs v. Cooper, 5 Minn. 254; Morrison v. Weaver, *ante*; Steele v. Putney, 15 Me. 327.

The first act, after hearing the words or witnessing the conduct upon which the alleged estoppel is founded, is the test of the party's belief in the truth of the representation; and when the act evinces a disbelief, no estoppel can thereafter be claimed.[9] It must also appear that the person sought to be estopped had legal capacity to contract; consequently an infant, or married woman,[10] are not at law estopped, except as to matters relative to which they can make a binding contract.[11] But a municipal corporation may be estopped as an individual would be to set up the unconstitutionality of a statute.[12]

Sec. 48. Disputable Presumptions of Law.

Disputable presumptions, like the former, are founded upon the general experience of mankind of a connection between certain facts or things, and the production of certain results therefrom. But, while in the case of the former, the connection is supposed to be invariable, yet in the latter, while the connection is *usually* invariable, yet, it is not always so, therefore while, if there is no proof to the contrary, courts will act upon it, yet it is open to proof that in a particular case, the connection does not exist and therefore the presumption fails. Thus, in all criminal cases because people do not generally commit crimes, it is presumed that a person charged with a crime, is innocent, but, as human experience has demonstrated that this is not always the case, proof is admissible to overcome the presumption, and from this arises the invariable rule that a person charged with a crime, is presumed to be innocent until proved to be guilty. So, too, it is presumed that a bond, mortgage or specialty of any description is paid, after the lapse of twenty years from the date of its maturity, but this is a mere presumption of fact which may be overcome by proof that payment thereof has not in fact been made, because experience demonstrates that people do not always enforce their rights on the one hand, or discharge their obligations upon the other, within that period. And generally, where, from a given state of facts, certain results *usually* ensue, it will be

[9] Andrews v. Aetna Life Ins. Co., 85 N. Y. 334.

[10] Innis v. Templeton, 95 Penn. St. 264.

[11] See Patterson v. Lawrence, 90 Ill. 194; 32 Am. Rep. 22, as to the rule in equity where the acts amount to fraud.

[12] City of Mt. Vernon v. State, 71 Ohio St. 428, 73 N. E. 515.

presumed that they do ensue; but this class of presumptions are only *prima facie*, in other words, presumptions of fact, which may always, if possible, be overcome by proof that in the particular case they did not ensue.

Sec. 49. Continuance of Fact.

A state of relations between parties once proved to exist, is presumed to continue until the contrary is shown;[1] and if these relations are shown to have existed under certain conditions, they are presumed to exist under the same conditions.[2] Thus, while it will not be presumed that a woman is married yet, when her coverture is once established, it will be presumed to continue until the contrary is shown.[3] And where one was said to be unmarried in 1862 it will be presumed he was unmarried in 1858.[4] So if a person is shown to have entered into the service of another under a certain contract, it will be presumed that all future services are continued under such contract, however long continued, unless a new contract is shown to have been subsequently made,[5] and he must sue upon the contract and not upon a *quantum meruit*. Acceptance of a mortgage subject to a claim of a certain bank "Limited" imports that the bank is a corporation, which fact is presumed to continue until the contrary is proved.[7]

So generally, where a state of affairs or of matters of fact are shown once to have existed, the presumption is that they still exist.[8] Thus, if a vessel is proved to have been seaworthy when a policy attached thereto, it will be presumed that she continued so during the whole time of the risk.[9] So if a state of war in a certain country is shown to have existed three years ago, it will be

[1] Eames v. Eames, 41 N. H. 177; Hood v. Hood, 2 Grant's Cas. (Penn.) 229; Montgomery Plank Road Co. v. Webb, 27 Ala. 618; Mullin v. Pryor, 12 Mo. 307; People v. McLeod, 1 Hill (N. Y.), 377.

[2] Gelston v. Hoyt, 1 John. (N. Y.) Ch. 543.

[3] Erskine v. Davis, 25 Ill. 251.

[4] Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

[5] Edrington v. Leach, 34 Tex. 285; Wood's Master and Servant, 192; Vail v. Jersey Little Falls Mfg. Co., 32 Barb. (N. Y.) 564; Nicholson v. Patchin, 5 Cal. 474; Wallace v. Floyd, 29 Penn. St. 184; Ranck v. Albright, 36 id. 367.

[6] Nicholson v. Patchin, *ante*.

[7] Anglo-Californian Bank v. Field (Cal., 1905), 80 Pac. 1080.

[8] Fan v. Payne, 40 Vt. 615; Bell v. Young, 1 Grant's Cas. (Penn.) 175; Brown v. Burnham, 28 Me. 38; O'Niel v. New York, &c., Mining Co., 3 Nev. 141; Brown v. King, 5 Met. (Mass.) 173.

[9] Wright v. Orient, &c., Ins. Co., 6 Bos. (N. Y.) 269; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389.

presumed still to exist;[10] or if a person is proved to have been insane at a former period, it will be presumed that he continues so,[11] unless it is shown that such insanity was produced by some violent disease.[12] So if a decree in chancery is shown to have been made, it will be presumed that it continued in force unless it is shown to have been annulled, reversed or set aside.[13] So where a partnership, agency, tenancy, or other similar relation is shown to have once existed, it will be presumed to continue until it is proved to have been dissolved,[14] and it is upon this principle that, where a person is shown to have permitted a servant or mistress to order goods upon his credit *upon several occasions,* he will be liable for goods so ordered after the relation has in fact been terminated, unless notice to the tradesman not to furnish them upon his credit has been given.[15] So where a certain custom was found to have existed in 1689, it was held that it would be presumed that it existed in 1840.[16] So, where an infant son is shown to have resided with his parents, it will be presumed that he continued unemancipated, as in the days of his infancy, although he long since arrived at manhood, unless there is some evidence to rebut this presumption;[17] and in an action to cancel a deed alleged by the plaintiff to have been executed by him in his minority, it was held that there was no presumption that he had attained his majority, and that he must prove that fact.[18] So, where a person is shown to have resided at a certain place at any time, it will be presumed that he continues to reside there until the contrary is shown.[19]

[10] Covert v. Gray, 34 How. Pr. (N. Y.) 450.

[11] Sprague v. Duel, 1 Clarke (N. Y.), 90; Ripley v. Babcock, 13 Wis. 425; Litlaw v. Litlaw, 54 Penn. St. 216; Saxon v. Whittaker, 30 Ala. 237; Breed v. Pratt, 18 Pick. (Mass.) 115; Smith v. Tibbitt, L. R., 1 P. D. 398; Att'y-Gen'l v. Paruthers, 3 Br. C. C. 443; Hassord v. Smith, L. R., 6 Eq. 429; Brimani v. Draper, 6 Ec. & Mar. Cas. 421; Nicholas v. Burns, 1 Swab. & T. 243; Johnson v. Blane, 6 Ec. & Mar. Cas. 457; but see People v. Smith, 57 Cal. 130, where it was held in a criminal trial that it was proper for the court to refuse to instruct the jury that if the defendant was shown to have been insane just before the crime was committed, the presumption was that he was insane when he committed it, but holding that such a refusal is erroneous when the insanity is shown to have been habitual. See State v. Wilner, 40 Wis. 304.

[12] Hix v. Whittemore, 4 Met. (Mass.) 545; Hall v. Warren, 9 Ves. 605; Walcott v. Alleyn, Milw. Ex. Tr. 69; Airey v. Hill, 2 Add. 289; White v. Wilson, 13 Ves. 87.

[13] Murphy v. Dorr, 25 Ill. 251.

[14] Pickett v. Peckham, L. R., 4 Ch. App. 190; Blandy v. De Burgh, 6 C. B. 623; Alderson v. Clay, 1 Stookee, 405; Clark v. Alexander, 8 Scott, 161; Ryan v. Lams, 12 Q. B. 460.

[15] Ryan v. Lams, *ante.*

[16] Scales v. Key, 11 Ad. & El. 819.

[17] Reg. v. Lilleshall, 7 Q. B. 158.

[18] Irvine v. Irvine, 5 Minn. 61.

[19] Kilburn v. Bennett, 3 Met.

So, where it is shown that a person's reputation for truth and veracity was good three years ago, it will be presumed that it still continues so.[20] So, where property is shown to have belonged to a person prior to his death, it will be presumed to have belonged to him at the time of his death;[21] and generally, where property, either real or personal, is shown once to have belonged to a person, it will be presumed that it continues to be his until the contrary is shown.[22] The opinions of individuals once entertained and expressed, and the state of their mind once proved to exist, are presumed to remain unchanged.[23]

Sec. 50. Continuance of Life. Effect of Seven Years' Absence.

A person once shown to have been living will be presumed to be still alive, in the absence of evidence that he had not been heard from within the last seven years.[1] But where a person goes abroad, and nothing is heard from him by those who, if he was living, would be likely to hear from him, the presumption of his life ceases after seven years.[2] By the civil law the legal presumption of life ceases in one hundred years from the date of birth,[3] and such also is the rule in the Scotch law;[4] but in this

(Mass.) 199; Prather v. Palmer, 4 Ark. 456; Wilmington v. Burlington, 4 Pick. (Mass.) 174; Randolph v. Easton, 22 id. 242; Rixford v. Miller, 49 Vt. 319.

[20] Lum v. State, 11 Tex. App. 483.

[21] Hanson v. Chatovich, 13 Nev. 395.

[22] Harrison v. Queen Ins. Co., 49 Wis. 71.

[23] State v. Stinson, 7 Law Rep. (Am.) 383.

[1] For the history of the rule showing its origin in 1805 in Doe d. George v. Jesson, 6 East, 80, see Thayer, Prelim. Treatise, p. 319. R. v. Lumley, L. R., 1 C. C. 196; Letts v. Brooks, H. & D. Suppt. (N. Y.) 36.

[2] Whiteside's Appeal, 23 Penn. St. 114; Smith v. Knowlton, 11 N. H. 191; Crawford v. Elliott, 1 Houst. (Del.) 465; Primm v. Stewart, 7 Tex. 178; Coper v. Thurmond, 1 Ga. 538; Brown v. Jewett, 18 N. H. 230; Smith v. Smith, 5 N. Y. Eq. 484; Osborn v. Allen, 26 N. J. L. 388; Burr v. Sim, 4 Whart. (Penn.) 450; Bradley v. Bradley, 4 id. 173; Flynn v. Coppee, 12 Allen (Mass.) 133; Forsaith v. Clark, 21 N. H. 409; Stinchfield v. Emerson, 52 Me. 465; Norman v. Jenkins, 10 Pick. (Mass.) 515; Eagle v. Emmett, 4 Bradf. (N. Y. Surr.) 117; Loring v. Steinman, 1 Met. (Mass.) 404; Mansburgh v. Jackson, 2 N. J. L. 229; Spurr v. Trimble, 1 A. K. Mar. (Ky.) 278; Stevens v. McNamara, 36 Me. 176; Tilley v. Tilley, 2 Bland (Md.), 436; Whiting v. Nicholl, 46 Ill. 230; Asburgh v. Saunders, 8 Cal. 62; Clarke v. Canfield, 15 N. J. L. 119. It is not necessary that the person should be shown to have gone out of the country; it is sufficient if he is shown to have been absent, unheard of, from the particular State, seven years. Newman v. Jenkins, *ante;* Woods v. Woods, 2 Bay (S. C.), 476; Spurr v. Trimble, *ante;* Wambough v. Schenk, *ante.*

[3] Campegius Tract. de Test. reg. 350.

[4] Hubb Ev. of Succ. 758.

country as well as in England there is no fixed time within which the presumption is allowed to prevail, and the fact that the person, if living, would be more than one hundred years old, is not conclusive.[5] The grantors in a deed dated 1817 were presumed to be dead in 1900, merely because such great age as their continued life would presuppose is contrary to human experience.[6] While, however, the law raises a presumption of death after an absence of seven years,[7] unheard of, yet it raises no presumption as to the *time* of death,[8] not even that he died on the *last day* of the seven

[5] Burney v. Ball, 24 Ga. 505; Weale v. Laever, Pollex, 67; Napper v. Sutton, Hutt. 119.

[6] Young v. Shulenburg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730.

In one case, where it was shown that the person, when last heard from, was twenty-two years old and in bad health, and would, if then living, be eighty years old, and although, upon inquiry at his last known place of residence and post-office address, his name was not known at the post-office nor inserted in the city directory, this was held not sufficient to raise a presumption of his death. Matter of Hall, 1 Wall., Jr. (U. S.) 85. In an English case the deposition of a witness taken sixty years before was rejected, there being no proof that a search had been made for the witness, and no account being given of him, Benson v. Olive, 2 Str. 920; Manby v. Curtis, 1 Price, 225, and in another case, where the term was sixty years old, the court took into consideration the *possibility* of the termor still being alive. Beverley v. Beverley, 2 Vern. 131; Doe v. Andrews, 10 Q. B. 314. But in an action of ejectment, where the lessor of the plaintiff, to prove his title, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were instructed that they might presume, not only that these persons were dead, but in the absence of all evidence to the contrary, that they died unmarried and without issue. Doe v. Deakin, 3 C. & P. 402. Whether the portion of the doctrine of the last case relating to the presumption that the persons died without issue is correct there may be some doubt, but in any event it seems that such a presumption will be sustained by very slight proof, such as failure to hear of any such issue upon due inquiry, or failure to answer advertisements calling for heirs, etc. Greaves v. Greenwood, L. R., 2 Exch. D. 287; see Emerson v. White, 29 N. H. 482, where it was held that there is no presumption either way as to marriage or the birth of children and that a person who asserts that a person is dead without issue must offer *some* evidence of the fact. But if the events are remote slight evidence will suffice.

[7] Where a wife is unable to discover any trace of her husband for seven years after diligent search a violent presumption of his death is raised. Bardin v. Bardin, 4 S. D. 305, 56 N. W. 1069; 46 Am. St. Rep. 791. See discussion in Davie v. Briggs, 97 U. S. 628, Ruloff v. People, 18 N. Y. 879.

[8] M'Carter v. Camel, 1 Barb. Ch. (N. Y.) 455. The probable time of death may be inferred from the circumstances, but if no sufficient facts are shown from which to draw a reasonable inference that death occurred *before* the lapse of that period, the person will, in all legal proceedings, be treated as having lived during the whole of that period. Eagle v. Emmet, 4 Bradf. (N. Y. Surr.) 117; Puckett v. State, 1 Sneed (Tenn.), 355; Gorden v. Gorden, 2 Houst. (Del.) 574; White v. Mann, 26 Me. 361; Merritt v. Thompson, 1 Hilt. (N. Y. C. P.) 550; Gibbs v. Vincent, 11 Rich. (S. C.) 323.

years;[9] therefore if it became important for a party to establish the precise time of death, he must do so by evidence and cannot rely either upon the presumption of death upon the one hand or of the continuance of life upon the other.[10]

While the presumption of the common law does not attach to the mere lapse of time less than seven years, independent of other circumstance, yet, upon an issue of life or death, the jury may, where the circumstances warrant it, find the fact of death from the lapse of a shorter period.[11] Where a woman was married again within four and one-half years after the disappearance of her first husband the presumption of the legality of the marriage ceremony overcomes the presumption of the continuance of life of the first husband and the marriage is presumed to be legal.[12] But evidence that a person suddenly disappeared without explanation on a certain day and has never been heard from since and that his relations in life were of such a character as to refute the theory of abandonment of family, friends, and everything calculated to conduce to his comfort and happiness is insufficient

[9] Nepean v. Knight, 2 M. & W. 894; McCarter v. Camel, *ante*.

[10] *In re* Phene's Trusts, L. R., 5 Ch. App. 139; Dunn v. Snowden, 2 Dr. & Sm. 201; Lewe's Trusts, L. R., 11 Eq. 236; Lambe v. Orton, 29 L. J. Ch. 286; *In re* Benham's Trusts, 37 L. J. Ch. 265; Pennefeather v. Pennefeather, L. R., 6 Eq. 171; *In re* Peck, 29 L. J. Pr. & Mat. 95; Hickman v. Upsall, L. R., 20 Eq. 136.

[11] Thus, where it appeared that a brig had sailed from Demerara to England, in December, 1828, and touched Dominica on the 24th of that month, and had never after been heard of, Vice-Chancellor KNIGHT-BRUCE, *after a lapse of seven years*, presumed that the vessel and crew were lost *before* the 29th of January, 1829, evidence being given that the average length of a voyage from Dominica to England was less than two months, and that the West Indian latitudes were subject to hurricanes, which were so much more prevalent between the 1st of August and the 10th of January that double rates of insurance were charged during that period. Sillick v. Booth, 1 Y. & C. 117; Ommaney v. Stillwell, 23 Beav. 328. So, too, when it is shown that a person when last heard of was aged, infirm or ill, R. v. Hasborne, 2 Ad. & El. 544; Beasney's Trusts, L. R., 7 Eq. 498; or has since been exposed to great perils, such as a storm and probable shipwreck, Watson v. King, 4 Camp. 272; death may be presumed in a less period. Thus, in the case of a missing ship bound from Manilla to London, on which the underwriters had voluntarily paid the amount insured, the death of those on board was presumed by the Prerogative Court, after the absence of only two years, and administration was granted accordingly; Patterson v. Black, 2 Park's Ins. 919. So, also, where a person takes passage on a ship or steamer, and upon arrival at port he is not to be found upon the boat, the boat not having landed during the voyage, a jury might with great propriety from this fact presume the person's death during the voyage.

[12] Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 52 Am. St. Rep. 180 and note p. 185.

to raise a presumption of death within seven years of that time.[13] The burden of proving the death of a person is upon him who sets it up;[14] and if he relies upon the absence of the person for seven years without being heard from, he must establish both facts before the presumption arises. Mere fact of absence is not enough; he must show inquiries made at his last known residence abroad, or if he had none that is known to his friends, inquiries made of persons in the place where he was last known to reside before he went abroad, and inquiries among his relatives and friends who would be most likely to hear from him if living.[15] Absence, in this connection, means that the person is not at the place of his domicile and that his actual residence is unknown, but removal alone is not enough. So where a person removes from his domicile in a State to establish a home for himself in another State or country at a place well known this is a change of residence and absence from the last domicile is that upon which the presumption must be built. If alive when last heard from in his new domicile the presumption is that life continues.[16] A statute providing for a presumption of death where a person absents himself from the State for seven years does not apply to children of tender years having been living with their parents and having no right of free locomotion. So where a family leaves a certain town there is no presumption after seven years that the children in it are dead under this statute.[17] The presumption of death by absence from home unheard of for seven years may be rebutted by evidence purely hearsay in character which may be considered by the jury, so the general report among the friends of the absentee and those who knew him that he was alive and in the United States army may be testified to and a witness may testify that he had recently conversed with a person from another State who informed the witness that the absentee was alive in that State.[18] So the issuing of letters of administration upon the estate of a person is *prima facie* evidence of the person's death, as it will be presumed that

[13] Mutual Benefit Co.'s Petition, 174 Penn. State 1, 34 A. 283, 52 Am. St. Rep. 814.

[14] Emerson v. White, 29 N. H. 482; Ashbury v. Sanders, 8 Cal. 62; Gilliland v. Martin, 3 McLean (U. S.), 490.

[15] McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455; Clarke v. Cummings, 5 Barb. (N. Y.) 339.

[16] Francis v. Francis, 180 Penn. State, 644, 37 A. 120, 57 Am. St. Rep. 668.

[17] Manley v. Pattison, 73 Miss. 417, 19 So. 236, 55 Am. St. Rep. 543.

[18] Dowd v. Watson, 105 N. C. 476; 11 S. E. 589; 18 Am. St. Rep. 920.

the court issuing the letters did so upon competent proof of that fact.[19] Proof of absence without being heard from for a period *less* than seven years, though but a *day,* will not be sufficient. The full period must have elapsed, even though it is shown that the person was in feeble health when he left the neighborhood, or was very aged.[20] But, while the law raises the presumption of death after seven years' absence *abroad* (which means either beyond seas, or out of the State), without being heard from, yet, it does not, except in peculiar cases, raise any presumption as to the *time* of death, but in all legal proceedings the person will be regarded as having lived until the expiration of the seven years;[21] *but where* a person sails on a voyage at a particular date, and the length of time which it takes to make the voyage is known, quickest and longest, it will, after the lapse of seven years without tidings from him, be presumed that he died within the period usually assigned for the longest voyage, and legal proceedings taken against or for him after that period will be deemed invalid.[22]

Sec. 51. Survivorship in Common Disaster.

By the civil law, when two or more relatives have perished by the same calamity, as a wreck, battle, conflagration, etc., in the absence of direct proof as to which survived, certain artificial presumptions are resorted to which are based on the probabilities of survivorship resulting from strength, age and sex. Thus, in the case of a father and son perishing by the same shipwreck or battle, by the civil law it is presumed that the son died first *if he was under the age of puberty; but if he was above that age,* it is presumed that he was the survivor, upon the principle that in the former case the elder is generally the most robust, and in the latter the younger.[1] By the French code, regard is had to the ages of fifteen and sixty, presuming that, as between those *under* that age and not over sixty, the latter survives; but if one of the parties is under fifteen, and the other *over* sixty, the former survives. If

[19] Tisdale v. Conn., &c., Ins. Co., 26 Iowa, 170; McNair v. Ryland, 1 Dev. (N. C.) 533.

[20] Ashbury v. Sanders, 8 Cal. 62; Burney v. Ball, 24 Ga. 505; Matter of Hall, Wall., Jr. (U. S.) 85.

[21] Eagle v. Emmett, 4 Bradf. Surr. Rep. (N. Y.) 117; White v. White, 26 Me. 361; Merritt v. Thompson, 1 Hilt. (N. Y. C. P.) 550; Puckett v. State, 1 Sneed (Tenn.), 355.

[22] Gerry v. Post, 13 How. Pr. (N. Y.) 118.

[1] Dig., lib. 34, tit. 5.

both parties were between those ages, but of different sexes, it is presumed that the male survived, *unless he was more than a year younger* than the female; but as between those of the same sex, it is presumed that the youngest survives.[2] But by the common law there is no presumption either of survivorship or contemporaneous death, *but in the absence of all evidence upon the point, it will be treated as a matter incapable of being determined.*[3] The question is, from the beginning to the end, one of fact, as bearing upon which the sex, age and relative physical strength of the persons who were lost may be shown, and is generally the only evidence which can be had upon the question;[4] and as a rule, in the absence of any evidence upon which a finding can be based, it will be presumed that all perished at the same moment.[5] In other words, as the fact is incapable of proof, the courts will asume that all perished at the same second of time.

[2] Code Civil, § § 720, 721, 722.

[3] Wing v. Augram, 8 H. L. Cas. 183; Newell v. Nichols, 75 N. Y. 78; Smith v. Croom, 7 Fla. 81; Coye v. Lach, 8 Met. (Mass.) 371. But see Pell v. Ball, 1 Cheve (S. C.), part 2, 57, where the civil law rule was practically adopted.

[4] Underwood v. Wing, 4 D., M. & G. 24; Green's Settlement, L. R., 1 Eq. 289.

[5] Sir John NICOLL in Taylor v. Diplock, 2 Phill. 261; In the Matter of Selwyn, 3 Hogg Ec. Rep. 748.

In the language of CHURCH, C. J., in Newell v. Nichols, 73 N. Y. 78, in which case a mother, aged sixty-nine, a son-in-law, aged forty-five, and two children, aged respectively ten and seven years, perished in the same shipwreck at sea, and in the absence of any other evidence it was held that there was no presumption of survivorship, "There are cases where a strong probability in theory at least would arise that one person survived another, and perhaps as strong as that there was a survivor, and yet the common law wisely refrains from acting upon it in either case. It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster, is not deemed sufficient. If there are other circumstances shown, tending to prove survivorship, courts will then look at the whole case for the purpose of determining the question, but if only the fact of death by a common disaster appears, they will not undertake to solve it on account of the nature of the question and its inherent uncertainty. It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances, it is not, as a question of probability, very unlikely to happen. At most the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of title to property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time. This is done not because the fact is proved, or that there is any presumption to that effect, but because there is no evidence, and no presumption to the contrary. The authorities are uniform upon this doctrine, but the expressions of some of the judges in announcing it are liable to be misunderstood as indicating a presumption of simultan-

Sec. 52. Sanity and Suicide.

Inasmuch as sanity is the normal condition of man, every one is presumed to be sane, and that presumption holds good, and is the full equivalent of express proof, until it is successfully rebutted. When insanity of one accused is set up as a defense, it is incumbent on him to rebut the ordinary presumption of sanity, and show, not beyond a reasonable doubt, nor either clearly or conclusively, but by fairly preponderating evidence, such as is ordinarily required to prove a fact in civil issues, that he was insane at the time of committing the alleged crime.[1] So the burden of proof to show incapacity to make a will or deed is upon the contestants, the original presumption of sanity and capacity being always indulged and this burden can only be discharged or

eous death, which is not the rule. For instance Sir William WYNNE said: "I always thought it the most natural presumption that all died together, and that none could transmit rights of property to another." Rex v. Heapes, 2 Salk. 593; 2 Phill. 296, note *c;* Doe v. Nepean, 5 B. & Ad. 91, 92.

"Sir John NICOLL said: 'I assume that both perished in the same moment.' Taylor v. Diplock, 2 Phill. 261; In the Matter of Selwyn, 3 Hagg. Ec. R. 748. And in the absence of clear evidence it has generally been taken that both died in the same moment. Sir Herbert JENNER said: 'The parties must be presumed to have died at the same time.' 1 Curties, 705.

"These expressions only mean that as the fact is incapable of proof, the one upon whom the *onus* lies fails, and persons thus perishing must be deemed to have died at the same time, for the purpose of disposing of their property. The Lord Chancellor, In Wing v. Underwood, *supra*, recognized the distinction, and explained the meaning of the rule. In commenting upon a similar expression of the Master of the Rolls to the effect that he must assume that Mr. and Mrs. Underwood both died together, the Chancellor said: 'From personal communication with his honor, I know that he is not aware that he ever used such an expression, and all he ever meant to say was that the property must be distributed just as it would have been if they had both died at the same moment.' And Mr. BEST, in his work on Presumptions, after laying down the general rule, states that it is not correct to infer from this that the law presumes both to have perished at the same moment, and adds: 'The practical consequence is, however, nearly the same, because if it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary, both individuals may have died at the same moment.' All the common-law authorities are substantially the same way, and the rule, which I think is wise and safe, should be regarded as settled. Its propriety is not weakened by the circumstances that its first application in this court prevents this estate from being turned into channels never contemplated or intended by the testatrix."

[1] Commonwealth v. Gerade, 145 Penn. State 289, 22 A. 464; 27 Am. St. Rep. 689; State v. Lawrence, 57 Maine 574; McNaghten's case, 10 Cl. & Finn, 200; *contra*, to the effect that where the jury is left in doubt as to insanity they should acquit, see Davis v. U. S., 160 U. S. 469; 16 Sup. Ct. Rep. 353; People v. Garbutt, 17 Mich. 9.

shifted by showing prior habitual or fixed insanity, or actual insanity or other incapacity at the date of the execution of the instrument.[2] Also where one is sane for the most of the time and his spells of insanity are transient the burden is upon him who would prove that he was insane at the time he signed a certain contract.[3] But insanity in its nature permanent, when once proved to exist, is presumed to continue, and the burden is on the party relying upon sanity to prove a lucid interval.[4] Where a person is adjudicated mentally unsound and a guardian is appointed for him this is *prima facie* evidence of want of testamentary capacity, and the burden is upon those who seek to uphold a will made by such a person to show by clear, explicit and satisfactory evidence that at the time it was executed the maker had the requisite degree of mental capacity.[5]

As the love of life is ordinarily a sufficient inducement for its preservation suicide will not be presumed in the absence of definite proof, but the presumption is against suicide.[6] So the death, even of an insane person is presumed, in the absence of proof, to be natural or accidental and not suicidal.[7] But this is a rebuttable presumption and easily yields to physical facts clearly inconsistent with it. It is not proof, nor does it stand in the way of proof, and when sufficient evidence is introduced to overcome this legal presumption, it disappears. So where a deceased person was found alone with a revolver in his hand and a wound in his temple in a place where no one could have been in the vicinity, with a memorandum explaining suicide the lower court may properly direct a verdict of suicide.[8] And where a defaulting officer is found dead in his own house and leaves a note written in view of his death the court may direct the jury to find a death by suicide.[9]

[2] Eastis v. Montgomery, 95 Ala. 486, 10 So. 204; 36 Am. St. Rep. 227. Eakin v. Hawkins, 52 W. Va. 124; 43 S. E. 211.

[3] McPeck's Heirs v. Graham's Heirs (W. Va., 1904), 49 S. E. 125.

[4] *In re* Knox's Will, 24 Iowa, 24, 98 N. W. 468.

Keely v. Moore, 196 U. S. 38; 25 S. Ct. 169. As to wills.

[5] Harrison v. Bishop, 131 Ind. 161, 30 N. E. 1069, 31 Am. St. Rep. 422.

[6] Hale v. Life Indemnity, etc. Co., 61 Minn. 516, 52 Am. State Rep. 616, 63 N. W. 1108.

[7] Walcott v. Metropolitan Life Ins. Co., 64 Vt. 221, 24 A. 992; 33 Am. St. Rep. 923.

[8] Hardinger v. Modern Brotherhood of America (Neb., 1905), 103 N. W. 74. See also Ross-Lewin v. Germanian Life Insurance Co. (Colo. App., 1904), 78 Pac. 305.

[9] Clemens v. Royal Neighbors of America (N. D., 1905), 103 N. W. 402.

Sec. 53. Ships not heard from.

It is a rule in insurance law, that when a vessel has sailed upon a voyage, and no tidings of her have been received within a reasonable time, she shall be presumed to have foundered at sea.[1] But there must be some evidence that when she left the port of outfit she was bound upon the voyage insured.[2] This presumption is so strong that it cannot be rebutted by mere rumors,[3] nor is it necessary to call witnesses from the port of destination; it is sufficient if it is shown that she has not been heard of at the port of outfit, after she sailed;[4] nor, even though it appears that the crew were saved, is it necessary to call any of them, nor to show that it was impossible to do so.[5] No definite time has been fixed upon, either by the common law or the custom of merchants, after which the insured may demand payment of his loss, when no intelligence of the vessel has been received. But the question in each case, whether a *reasonable* period for receiving tidings of the vessel has elapsed or not, is one of fact for the jury; although a practice has grown up among insurers in England, of deeming a vessel lost if she is not heard from within six months after her departure for any port in Europe, or in twelve months if bound for a greater distance.[6] If a ship, shortly after sailing, without visible or adequate cause becomes leaky or otherwise unfit for the voyage, it is presumed that she was unseaworthy when the risk commenced.[7] Thus, where a vessel, on the next day after sailing, suddenly sprung a leak and was lost, without any strees of weather or other visible cause to which the leak could be ascribed, it was held that the loss should be imputed to some latent or inherent defect in the vessel, which rendered her unseaworthy, and for which the underwriters were not liable.[8]

Sec. 54. Accounts.

It is presumed that an entry in a book of accounts, as originally made, was correct; consequently, if it is subsequently changed, the

[1] Green v. Brown, 2 Str. 1199; Newby v. Reed 1 Park on Ins. 148; Koster v. Reed, 6 B. & C. 19; Brown v. Neilson, 1 Cai. (N. Y.) 525.
[2] Coster v. Innes, Ry. & M. 333.
[3] Koster v. Reed, *ante*.
[4] Twemlaer v. Oswin, 2 Camp. 85.
[5] Koster v. Reed, *ante*.
[6] 1 Park on Ins. 149.
[7] Parker v. Potts, 3 Dan. 23; Watson v. Clark, 1 id. 344; Munro v. Vandam, 1 Park on Ins. 469.
[8] Patrick v. Hallett, 3 John. Cas. (N. Y.) 76; Talcott v. Commercial Ins. Co., 2 John. (N. Y.) 124; Wright v. Orient Ins. Co., 6 Bos. (N. Y.) 269; Sturm v. Gt. Western Ins. Co., 40 How. Pr. (N. Y.) 423.

burden is upon the party presenting the account to show that the alteration expresses the real facts.[1] So, where it appears from the books of the parties, or from any other source, that the accounts between them have been settled, and a balance struck and agreed upon, it will be presumed that the balance so agreed upon is correct, and the burden of showing the contrary is upon the party who seeks to set aside the settlement.[2] Where the accounts between the parties afford no evidence of a settlement having been made between them, they are presumed to be open, and the burden of proving the contrary is upon the party who claims that they were liquidated.[3] Where an account is given or forwarded to the other party and retained by him for a long time without objection, it is presumed to be correct,[4] and the burden is upon the party receiving it to prove its inaccuracy.[5]

Sec. 55. Agency.

Where a person makes a contract, oral or written, representing himself to be, and as the agent of another, it is, *as between him and the party with whom he contracted* in the first instance, presumed that he had authority to so act, and in an action against him thereon the burden is upon the plaintiff to show that he had no authority in fact to make such contract. Thus, where a promissory note is given to B., signed by A., agent for C., as the note upon its face does import a personal obligation, the burden is upon the plaintiff to show his personal liability,[6] but in an action against the supposed principal, there is no presumption either way, but the burden is upon the party seeking to enforce the contract, to establish in some way, by independent evidence, the fact of agency.[7] The legal presumption is that when one known to be an agent deals or contracts within the scope of his authority credit is extened to the principal and not to the agent.[8] But where a per-

[1] Sheiles v. West, 17 Cas. 324; S. P. State v. Knapp, 45 N. H. 148.
[2] Mills v. Johnston, 23 Tex. 308.
[3] M'Lellan v. Crofton, 6 Me. 308.
[4] Chebb v. Chambers, 3 Ired. (N. C.) L. 374; Sheppard v. Bank of Missouri, 15 Mo. 143; Freeland v. Heron, 7 Cr. (U. S.) 147; Darby v. Lastrapes, 28 La. An. 605; Rowell v. Pacific R. R. Co., 65 Mo. 658; Greene v. Harris, 11 R. I. 105.
[5] Bertrand v. Taylor, 32 Ark. 470; Vandeveer v. Statesir, 39 N. J. L. 593.
[6] Bradley v. McKee, 5 Cr. (U. S. C. C.) 298.
[7] Holmes v. Dodge, 1 Abb. Adm. (U. S.) 60; Reynolds v. Continental Ins. Co., 36 Mich. 131.
[8] Anderson v. Timberlake, 114 Ala. 377, 22 So. 431; 62 Am. St. Rep. 105.

son deals with a person who is agent for a foreign principal, the presumption is that he does not contract with the foreigner, but trusts the person with whom he actually makes the bargain;[9] but although Judge STORY, in his work on Agency,[10] says that this presumption is so strong as almost to amount to a presumption of law, yet it is held that the presumption may be rebutted by any evidence, extrinsic or intrinsic, which tends to show that credit was given to the foreign principal.[11]

Sec. 56. Carriers; Negligence, &c.

In the case of common carriers, whether by land or water, upon proof of delivery of goods to them and loss of them by them it is presumed that they were lost by their negligence, and the burden is upon them to show that they were lost by one of the perils from which they are exempted either by the law or the contract of shipment,[1] and the same rule applies to bailees for hire. The fact of a shipment of merchandise to a carrier in good order and delivery in bad order is of itself evidence of negligence on the part of the carrier but it is evidence only to be considered by the jury with all the other evidence. Where there was evidence that merchandise shipped was carefully packed and that there was no accident or collision of any description in the course of the transportation the whole question is for the jury. There is no burden upon the carrier to show just how the accident happened in order to relieve it from the charge of negligence.[2] As between connecting lines the carrier in whose hands property is found damaged is presumed to have caused the damage and the burden is upon him to rebut the presumption.[3] But this presumption only applies in the case of common carriers of goods, and in the case of carriers of passengers, except in special instances, some proof of negligence must be given;[4] but as in the case of a railroad company,

[9] Heald v. Kentworthy, 10 Exch. 743; Story on Agency, § 290.

[10] § 290.

[11] Green v. Kopke, 18 C. B. 549; Mahoney v. Kekute, 14 id. 390.

[1] Tarbox v. Eastern Steamboat Co., 50 Me. 339; Steamer Niagara v. Cordes, 21 How. (U. S.) 7; Shaw v. Kardner, 12 Gray (Mass.), 488; Ross v. Hill, 2 C. B. 890; Coggs v. Barnard, 2 Ld. Ray'd, 978.

[2] Buck v. Penn. R. Co., 150 Penn. State, 170, 24 A. 678; 30 Am. St. Rep. 800.

[3] Morganton Manufacturing Co. v. Ohio, etc., Ry. Co., 121 N. C. 514, 28 S. E. 474; 61 Am. St. Rep. 679.

[4] Mitchell v. Western, &c., R. R. Co., 30 Ga. 22; Northern Central Railway Co. v. State, 54 Md. 113; McKissock v. St. Louis, &c., R. R. Co., 73 Mo. 456.

where an injury to a passenger results from the breaking down of a passenger coach, the breaking of a rail, the falling away of an embankment, the breaking down of a bridge, a collision of trains, or from the train being thrown from the track, the law will presume negligence on the part of the company unless the contrary is shown,[5] because in these instances the carrier owes a duty to the passenger to exercise reasonable vigilance to keep the appliances of the business in a safe condition, and from the very circumstance of the existence of the defect, it is reasonable, in the first instance, to presume that if he had done so, the injury would have been avoided. Indeed, in many cases, *from the mere happening of an accident* a jury will be warranted in presuming negligence, and this may be said to be the case *when the accident is one which, in the ordinary course of things, does not occur where proper care is exercised in the management of the business,* and consequently affords reasonable grounds for presuming negligence.[6] Thus where a stage coach is overturned or breaks down without any apparent cause, the law implies negligence, and the burden is upon the owners to rebut the presumption.[7] So where a building is injured by a blast, the presumption is that the blast was not properly covered.[8] But in all cases it must be remembered that neither fault or negligence are to be presumed without *some* evidence upon which to predicate it.[9] In other words, the plaintiff must show an injury which *prima facie* resulted from some fault on the part of the defendant.[10]

In Nebraska it is considered that street railway companies as common carriers of passengers, are bound to the utmost care toward them, and the law presumes that one injured while being transporated by a common carrier was injured in consequence of the latter's negligence; and to escape liability it must show that it has discharged the full measure of its legal duty and was in nowise to blame for the accident. Lincoln Street Ry. Co. v. McClellan, 54 Neb. 672, 69 Am. State Rep. 736; 74 N. W. 1074.

[5] Pittsburgh, &c., R. R. Co. v. Williams, 74 Ind. 462; Flannery v. Waterford, &c., R. R. Co., I. & R., 11 C. L. 30; Skinner v. London, &c., Railway Co., 5 Exch. 787.

[6] Bryne v. Boadle, 2 H. & C. 722; Scott v. London Dock Co., 3 id. 596; Kearney v. London, &c., Railway Co., L. R., 5 Q. B. 411; 6 id. 759; Ware v. Gay, 11 Pick. (Mass.) 106.

[7] Ware v. Gay, *ante;* Feital v. Middlesex R. R. Co., 109 Mass. 398; Brehm v. Gt. Western R. R. Co., 34 Barb. (N. Y.) 256; Edgerton v. N. Y., &c., R. R. Co., 35 id. 389; Reed v. New York Central R. R. Co., 56 id. 493; Holyoke v. G'd Trunk R. R. Co., 48 N. H. 541; Virginia Central R. R. Co. v. Sanger, 15 Gratt. (Va.) 230; Pittsburgh, &c., R. R. Co. v. Thompson, 56 Ill. 138; Brignoli v. Gt. Eastern R. R. Co., 4 Daly (N. Y. C. P.), 182.

[8] Ulrich v. McCabe, 1 Milt. (N. Y. C. P.) 251.

[9] Lyndsay v. Conn. & Pass. River R. R. Co., 27 Vt. 643.

[10] Terry v. N. Y. Central R. R. Co.

Excepting where contractual relations exist between the parties, as in the case of carriers of passengers and some others, negligence will not be presumed from the mere happening of an accident and a consequent injury, but the plaintiff must show either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence.[11]

Sec. 57. Character.

It is presumed that every man's character is good until the contrary is proved;[1] consequently, in an action of slander or libel, it is not necessary for the plaintiff in the first instance to do more than prove the speaking or publishing of the words complained of, and if the defendant relies upon the truth of the words in defense, he must prove it. The fact that a man's character is shown to have been good, does not raise a presumption of innocence, as against evidence which reasonably raises a presumption of guilt.[2] It is said, however, that in a criminal case there is no presumption that the character of the accused is either good or bad.[3] In civil actions, with the exception of those cases where by the pleadings the character of the party is put in issue the weight of authority is against the admissibility of such testimony to rebut imputations of misconduct or fraud. In criminal cases the character of the defendant cannot be attacked by the presumption unless evidence of his good character is introduced by the defendant. In an action by an employer to recover money claimed to be wrongfully appropriated by an employee, evidence of the good character of the employee is not admissible.[4] Where the evidence is such as to raise a presumption against a man's character, and he does not attempt to remove it, it will be presumed that it cannot be done,[5] and such a presumption cannot be removed by showing that the party holds a certain public position, as, that he is licensed to practice as an attorney,[6] because experience has demonstrated that persons who have been elevated to high positions are liable to be

22 Barb. (N. Y.) 574; Buel v. N. Y. Central R. R. Co., 31 N. Y. 314.

[11] Stearns v. Ontario Spinning Co., 184 Penn. State, 519, 39 A. 292; 63 Am. St. Rep. 807.

[1] Goggans v. Monroe, 31 Ga. 331. See also p. — *post.*

[2] State v. Hagard, 12 Minn. 293.

[3] Dryman v. State, 102 Ala. 130, 15 So. 433; Gater v. State (Ala., 1905), 37 So. 692.

[4] Adams v. Elseffer, 132 Mich. 100, 92 N. W. 772.

[5] Parks v. Richardson, 4 B. Mon. (Ky.) 276.

[6] Haynes v. State, 17 Ga. 465.

lacking in integrity, and, if a man's character is really good, it is reasonable to presume that he can always show it by direct proof.

Sec. 58. Fraud, Undue Influence or Illegality.

Fraud is never presumed, either at law or in equity,[1] but the burden is upon the party alleging it to prove it,[2] *unless the circumstances shown are of such a strong and pregnant character that no other reasonable conclusion can be drawn from them,* in which case the burden is shifted upon the other party to prove *bona fides in* the transaction;[4] and if the presumptive circumstances are strong, they will outweigh positive testimony against it.[5] It will not be presumed that a party will violate his contract, and an algation of the complaint that it intends to do so, in advance of any act constituting such violation, cannot prevail against the presumption of good faith and fair dealing.[6]

The fact that a will is made favorable to one who took care of the testator in his last illness does not raise the presumption of undue influence, as undue influence is a defense and is not to be presumed.[7] The burden of proof in its proper sense does not ordinarily shift from one party to the other so long as the parties remain at issue upon a proposition affirmed upon the one side and denied upon the other. So where a contestant of a will shows various circumstances tending to show undue influence, as that a certain party benefitted from the will and was in close confidential relations to the testator, this evidence is properly considered by the jury but it does not shift the burden of proof. This burden upon the whole evidence, having in view the situation referred to and of the other circumstances, is still upon the contestant who is to sustain the proposition affirmed by him by a preponderance

[1] Reeves v. Dougherty, 7 Yerg. (Tenn.) 222; Hager v. Thomson, 1 Blackf. (U. S.) 80; Blaisdell v. Carnell, 14 Me. 370; Martin v. Drumm, 12 La. An. 494; Sutter v. Lackman, 39 Mo. 91; Wright v. Prescott, 2 Barb. (N. Y.) 196; Salmon v. Orser, 5 Duer (N. Y.), 511; Packard v. Clapp, 11 Gray (Mass.), 124; Oaks v. Harrison, 24 Iowa, 179; Hair v. Little, 28 Ala. 236; Silvers v. Hedges, 3 Dana (Ky.), 439.

[2] Hager v. Thomson, *ante.*

[3] Poxton v. Boyce, 1 Tex. 317; Short v. Staples, 1 Gall. (U. S. C. C.) 104; Gayso v. Delaraderi, 9 La. An. 278.

[4] Hair v. Little, *ante.*

[5] Short v. Staples, *ante.*

[6] Mordhurst v. St. Wayne & S. W Traction Co. (Ind., 1904), 71 N. E. 642.

[7] McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

of all the evidence. Such evidence does not raise a presumption of law of undue influence as the issue is one of fact and the court disapproves of a statement that any particular evidence is sufficient to change the issue from one of fact to one of law.[8] The court should scrutinize carefully a gift by a child to a parent, but the burden of proof even in this case is on him who would show the gift void from undue influence.[9] But it is said that one who takes care of a testator in his last illness and who has him entirely under her control and who repeatedly requests him to make a will has the burden of showing that the will when made was not the product of undue influence especially where the testator has made an unnatural and unjust disposition of his property.[10]

So it is presumed that all persons act legally. Thus the presumption is that the acts of fiduciaries are legal and all done in good faith.[11] The law will presume where a statute requires a certain kind of contract to be in writing that the parties to it have not violated the statute, so in declaring upon such a contract the plaintiff need not allege in his declaration that it was in writing.[12] It will be presumed that a legislative act or municipal ordinance was duly passed unless the contrary affirmatively appears from the records of the body. Compliance with all vital requirements will be presumed notwithstanding the silence of the records.[13] A territory which has exercised the functions of a municipal corporation for a long while, will be presumed to be legally incorporated.[14] Where work is begun by a private party upon a street it will be presumed that the necessary permit required by the city ordinances has been obtained.[15] But it has been held that the mere fact that a city has power to establish a dock line raises no presumption that it has done so or that an existing dock is built in accordance with it.[16] The fact that a party at a former trial of the same case had attempted to procure false testimony and cor-

[8] Appeal of O'Brien, Maine, 1905, 60 A. 880.

[9] Towson v. Moore, 173 U. S. 17, 19 S. Ct. 332.

[10] Carroll v. Hause, 48 N. J. Equity, 269, 22 A. 191, 27 Am. St. Rep. 469.

[11] McCreery v. First National Bank of Bluefield, 55 W. Va. 663, 47 S. E. 890.

[12] Draper v. Macon Dry Goods Co., 103 Ga. 661, 30 S. E. 566, 68 Am. St. Rep. 136.

[13] Portland v. Yick, 44 Or. 439, 75 Pac. 706.

[14] People v. Pike, 197 Ill. 449, 64 N. E. R. 393.

[15] McWetley v. Aurora Electric Light & Power Co., 202 Ill. 218, 67 N. E. R. 9.

[16] Du Pont v. Sanitary Dist., 203 Ill. 170, 67 N. E. R. 815.

ruptly to influence the jurors is admissible against him as it raises a presumption that the truth would operate against him in a fair trial.[17] *Odiosa et inhonesta non sunt praesumenda;*[18] *Injuria non praesumuntur;*[19] *Omnia praesumuntur legitime facta, donec probetur in contrarium;*[20] *Fraus est odiosa, et non praesumenda,*[21] are maxims of daily application in our courts, both of civil and criminal jurisdiction, to every diversity of human action which is not itself of such a character as to pronounce its own condemnation. A party having a legal right, enters upon land; the law presumes that he enters with a view to that right, and not with a wrongful intention.[22] So, that a deed of a trustee having power to convey upon a certain contingency, was not given until after the condition happened;[23] and generally that a trustee has faithfully executed his trust.[24] And so against every act of immorality.[25] Equally so against acts of negligence; for where it was sought to charge the defendant with having placed a dangerous commodity on board a ship without due notice to the captain, it was held that the want of notice should not be presumed, but the contrary.[26] And there cannot be a doubt that negligence in most of the different descriptions of bailees should never be presumed.[27] So, when a vessel is in her usual business, it will be presumed that the master is on board, that being his duty.[28]

If, after every effort to establish fraud, it remains doubtful upon the proof, innocence is to be presumed.[29] So the presumption is against the breach of a positive law. By an English statute, letters not sent with, and respecting packages, must be mailed, and cannot be sent by private post. It appearing that a letter was with the package in the parcel sent, the court presumed that it had respect to the parcel, inasmuch as the contrary would be to

[17] McHugh v. McHugh, 186 Penn. State 197, 40 A. 410, 65 Am. St. Rep. 849.

[18] 10 Rep. 56, a.

[19] Co. Litt. 232, b.

[20] Co. Litt. 232, b.

[21] Cro. Car. 550.

[22] Benson v. Bolles, 8 Wend. (N. Y.) 175.

[23] Morrison v. M'Millan, 4 Litt. (Ky.) 210.

[24] Shilknecht v. Eastburn, 2 G. & J. (Md.) 114.

[25] Cusack v. White, 1 Rep. Const. Ct. (S. C.) 282.

[26] Williams v. The East India Co., 3 East, 192.

[27] Story on Bailments 152, 153; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 271.

[28] Cutter v. Moore, 7 N. J. Eq. 219. And see Co. Litt. 78, b.

[29] Lee v. Cook, 1 Wash. (U. S. C. C.) 306; Munroe v. Gardner, 1 Rep. Const. Ct. (S. C.) 308. *Et in facto quod se habet ad bonum et malum, magis de bono quam de malo praesumendum est.* Co. Litt. 75, b.

violate the act of parliament.[30] Upon the authority of the last case it was afterwards held that an importer will be presumed to have caused his goods to be entered at the custom house according to law.[31] So strong is this presumption, that where a woman married within twelve months after her first husband was last heard of, his death was presumed.[32] So, evidence that a theatre has gone on to perform without interruption authorizes the presumption that it is licensed pursuant to the statute;[33] and a corporation, in receiving a contract for debt, will be presumed to have acted within its powers.[34]

Sec. 59. Alteration of Instruments.

We are to presume that an unexplained interlineation, erasure, obliteration or other alteration of a written instrument was made before its execution. Such would, of course, be the presumption on a criminal prosecution for forgery; and the range of decisions in civil cases, with a few exceptions, follows the same rule.[1]

Exceptions to this doctrine are found in the case of bills of exchange, promissory notes and the like commercial paper. Thus, on a question arising whether the date of an acceptance was altered (the alteration appearing on its face) before or after the bill was indorsed, the indorsement being unavailable if made before the alteration, ABBOTT, Ch. J., refused to presume in favor of an alteration at the proper time, observing that the plaintiff must

[30] Bennett v. Clough, 1 B. & Ald. 461.

[31] Sissons v. Dixon, 8 Dow. & Ry. 526; 5 B. & C. 758.

[32] Rex v. Inhabitants of Twyning, 2 B. & Ald. 386. See also Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 52 Am. St. Rep. 180 and note p. 185.

[33] Rodwell v. Redge, 1 C. & P. 220.

[34] New York Fireman's Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664.

[1] In Fitzgerald v. Ld. Fauconberge, Fitz-G. 207, the interlineation was in a deed of conveyance or settlement of F.'s estate, and tended to enlarge the power of revocation over his estate, which he had received to himself; and Lord Chief Baron REYNOLDS (with whom the Master of the Rolls and Lord Chancellor seem to have concurred) said he must look upon it as if it had been originally incorporated in the body of the deed, "for there was no proof when these words were interlined." Fitz-G. 214. The Lord Chancellor speaks of it at page 223. In Trowel v. Castle, 1 Keb. 22, it was given in charge to the jury that "an interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after." So, in Wickes v. Caulk, 5 H. & J. (Md.) 41, on objection that the subscribing witnesses' names were erased, the court declared that "it is incumbent on a party who wishes to avoid a deed by its erasure to prove that the alteration was made after its execution and delivery." See note 433, vol. 2.

prove the alteration to have preceded the acceptance, otherwise it would be void for want of a new stamp.[2] Here, it will be perceived, was a complete departure from the usual presumption in favor of innocence; for the judge intends a forgery. If the case went on a general inclination observed among men to evade the burden imposed by the stamp laws, it is obvious that the onus would be changed in respect to various other species of paper, as well as the commercial kind. So, in a subsequent case, where the action was by the indorsee against the acceptor of a bill of exchange, an alteration appearing to have been made in the sum, it was held at bar to lie with the plaintiff to prove that it was properly made.[3]

Another exception has been made in case of an appeal bond, though the court do not deny the general presumption in favor of an alteration before execution. They say the presumption may be rebutted; and they will not put the appellee to that hazard.[4] In the latter case, it is said, a note of the alteration by the attesting witness would have obviated the objection, and that this might have been subjoined by the witnesses on the motion to dismiss the appeal; and it is agreed by all the cases, that where the alteration appears to be suspicious on its face, and is not duly noted, as if the paper have been cut close, or a mutilated figure be left, or the ink differ, or the handwriting be that of a holder interested in the alteration, etc., the onus lies with the party who claims that the alteration was genuine.[5]

So if the suspicion arises from extraneous circumstances.[6] And the instrument may, in turn, be sustained by internal evidence of fairness, or external evidence applicable to the transaction.[7]

Nor is it to be disguised that an unpleasant appearance of contrariety exists among the cases as to the general rule, where no

[2] Johnson v. Duke of Marlborough, 2 Stark. 313.

[3] Henman v. Dickinson, 5 Bing. 183. But see Cumberland Bank v. Hall, 215. And see Sayre v. Reynolds, 737; Rankin v. Blackwell, 2 John. Cas. (N. Y.) 198, 200.

[4] Sutphen v. Hardenberg, 9 N. J. Eq. 288; Shinn v. White, 10 N. J. Eq. 187.

[5] Bishop v. Chambre, 3 C. & P. 55; Nunnery v. Cotton, 1 Hawks (N. C.), 222; Jackson *ex dem.* Gibbs v. Osborn, 2 Wend. (N. Y.) 555; Collier v. Jacoby, 9 Cow. 125, 126; M'Micken v. Beauchamp, 2 Miller (La.), 290. See also Graham v. Middleby, 185 Mass. 349.

[6] Campbell v. Roe, 2 Hawks (N. C.), 93.

[7] Glanville v. Paine, Barnardist. Ch. Rep. 18. And see Cumberland Bank v. Hall, 5 N. J. Eq. 215; Rankin v. Blackwell, 2 John. Cas. (N. Y.) 198.

suspicion arises independent of the alteration itself, while various high authorities follow the ancient rule of presumption in favor of an alteration *before* execution.[8]

Where a deed or assignment is offered in evidence as a link in a chain of title, it is admissible, notwithstanding an alteration by erasure and interlineation apparent on the face of the instrument, in a different ink.[9] This is sometimes placed on the ground

[8] 12 Vin. Abr. 57, Evidence Q., a. 2, pl. 5; 13 id. 41, Faits u, pl. 11; 2 Wood's Inst. (10th ed.) 286, ch. 3; 1 Swift's Syst. 310; 4 Cruis. Dig. 496, tit. 32, ch. 26, § 10; Rankin v. Blackwell, 2 John Cas. (N. Y.) 198; Cumberland Bank v. Hall, 5 N. J. Eq. 215; Stark. Ev. pt. 4, p. 476, note *h;* Prevost v. Gratz, 6 Wheat. (U. S.) 481, 502. Other cases, or at least other dicta of very able judges, are diametrically opposed. In Gibbs v. Osborn, 2 Wend. (N. Y.) 555, although that case is sustainable on the ground of a strong suspicion, independent of the mere erasure, yet the reasoning of the court, who speak by SUTHERLAND, J., is general, and would seem to change the onus in all cases. The authorities cited by him apparently relate to one case only, viz.: that of an altered deed, the execution of which is claimed to be proved by its age and possession under it. In such a case age and possession are not sufficient, but the ordinary proof must be resorted to. Mr. Phillipps, vol. 1, p. 405, ed. of 1823, cited by the learned judge, also would seem applicable to cases of alteration generally. The dictum of WASHINGTON, J., in the case of Prevost v. Gratz, in note *b* to the above page of Phillipps, reported in 1 Pet. (U. S. C. C.) 364, 369, is to the same effect with the doctrine of SUTHERLAND, J.; and both are sustained by the Nisi Prius decision, and charge to the jury of MCKEAN, C. J. Morris' Lessee v. Vanderen, 1 Dal. (U. S.) 64, 67. The force of Mr. Justice WASHINGTON'S decision and dictum, in Prevost v. Gratz, was taken away by a review and reversal of his decree, in the Supreme Court of the United States (S. C., 6 Wheat, 481, 502), by which the authority of that high tribunal is turned in favor of the ancient rule. DUNCAN, J., speaking of that case, in Heffelfinger v. Shutz, 16 S. & R. (Penn.) 47, calls it a presumption made in favor of innocence, "even where the alteration was in favor of the person in whose handwriting it was." Still, however, if we superadd the decisions of the English courts upon commercial paper, which, although we have set them down as making an exception, are not directly so treated by the judges, the discrepancy may be quite embarrassing. We called those cases exceptions, because they do not profess to overrule or question the ancient cases. It is certainly a point of no little interest, how the rule shall finally stand, which must exercise almost a daily influence on important rights. The dictum of a learned court, proceeding mainly according to the civil law, also sustains the above departures from what was clearly the ancient rule of the common law. We allude to the late case of McMicken v. Beauchamp, 2 Miller (La.), 290. There a contract appeared to be altered in a material part by *different ink*. The court disregarded the difference of the ink (which we have seen would have changed the onus under the old common-law rule); and, on quotations from the civil law, as construed by Spanish commentators, take the broad ground, "that writings erased or interlined, are presumed to be false." They add that "the rules in relation to this subject, cited from the Spanish and civil law, are in conformity with the law of merchants, and all systems of jurisprudence with which we have any acquaintance."

[9] Smith v. McGowan, 3 Barb. (N. Y.) 404.

that the law presumes an interlineation in a deed to have been made at or before the time of its execution.[10] In some of the States no such presumption is raised.[11] There being no circumstance of suspicion appearing upon the deed, except that which arises from the mere fact of the erasure or interlineation, the court will not presume a forgery of the instrument; but when the alteration of the paper is such as to change its legal effect in favor of the party producing it, the presumption that it was made before execution is not very strong—barely sufficient for its admission in evidence; and in any case where the alteration is material, the time when it was made is a question of fact to be passed upon by the jury, and one that naturally calls for some explanation on the part of the person offering the instrument in evidence.[12] The refusal to produce a deed alleged to contain a clause fraudulently inserted, which did not appear in the mortgage as recorded in the clerk's office, is a badge of fraud from which the jury may pronounce against the claim under that clause.[13] In the case of a will, which bears on its face evidence of having been interlined and added to and altered in a material part, the whole being in the handwriting of the testator, the party producing and claiming under it is bound to explain the suspicious circumstances. Evidence being given on both sides, the question whether the deceased executed that will, is one of fact, unembarrassed by any presumption one way or the other.[14] The act of an officer certifying a judgment and noting erasures, alterations and interlineations, will be presumed to have been made at the time the roll was authenticated, truly and in good faith.[15]

In respect to bills and notes, it will not be presumed that an alteration by erasure or by interlineation, apparent on the face of the paper, which tends to diminish the rights of the party to whom it was given, was made *after* the paper was executed;[16] and it has been frequently held, though the authorities are not harmonious, that no such presumption will be raised even where the alteration

[10] Doe v. Catamore, 5 Eng. Law and Eq. 349; Farnsworth v. Sharp, 4 Sneed (Tenn.), 55; Stoner v. Ellis, 6 Ind. 152; Bailey v. Taylor, 11 Conn. 531, 534; Crabtree v. Clark, 20 Me. 337.

[11] Ely v. Ely, 6 Gray (Mass.), 439; Jordan v. Stewart, 23 Penn. St. 244.

[12] Jackson v. Osborn, 2 Wend. (N. Y.) 555; Herrick v. Malin, 22 Wend. (N. Y.) 388.

[13] Hager v. Hager, 38 Barb. (N. Y.) 92.

[14] Van Buren v. Cockburn, 14 Barb. (N. Y.) 118.

[15] Lozier v. Westcott, 26 N. Y. 149.

[16] Bailey v. Taylor, 11 Conn. 531.

would enure to the advantage of the payee or holder.[17] Clearly, not where the payee only fills in a blank in the note.[18] The English rule calls for explanation of the alteration of the bill or note from the party producing it.[19] An alteration of a note so as to make the interest payable semi-annually, made by the maker and payee after its delivery, discharges the surety.[20] Where an instrument is altered without the consent of all parties to it this is a spoliation and every presumption will be indulged against the spoliator.[21]

Sec. 60. Damages.

From proof of an injury to a right some damage is presumed to sustain the right,[22] but if more than nominal damages are claimed, they must be proved and cannot be presumed.[23] If a number of cattle belonging to different persons break into another's enclosure and do damage, each, in the absence of any proof to the contrary, will be presumed to have done an equal damage.[24]

Sec. 61. Identity of Name.

Identity of name is *prima facie* evidence of identity of person,[1] where there are no particular circumstances tending to raise a question as to the party being the same,[2] and although the pre-

[17] Agawam Bank v. Sears, 4 Gray (Mass.), 95.

[18] Kitchen v. Place, 41 Barb. (N. Y.) 465.

[19] Knight v. Clements, 8 Ad. & El. 215; Henman v. Dickinson, 5 Bing. 183; Clifford v. Parker, 2 M. & G. 909.

[20] Dewey v. Reed, 40 Barb. (N. Y.) 16.

[21] Where the maker of a note destroys it some time after the death of the payee, which occurred in 1882, and suit was brought upon the note in 1900 and there is no evidence to show the date or time of payment, the jury may infer that it was not barred by the statute of limitations, and was valid and enforceable where suit was brought within two years of the appointment of an administrator. This is an application of the doctrine "*Contra spoliatorem omnia praesumuntur.*" Sullivan v. Sullivan, 188 Mass. 380, 74 N. E. 608.

[22] Tedder v. Stiles, 16 Ga. 2.

[23] Fasseler v. Lane, 48 Penn. St. 407; Farley v. Vanmickle, 19 La. An. 9.

[24] Partenheimer v. Van Orden, 20 Barb. (N. Y.) 479.

[1] The name of a party in a record of judgment offered being identical with that of a party before the court is *prima facie* proof of identity of person. Ritchie v. Carpenter, 2 Wash. 512, 28 P. 380; 26 Am. St. Rep. 877. See also Campbell v. Wallace, 46 Mich. 320; Gitt v. Watson, 18 Mo. 274; Cates v. Loftus, 3 A. K. Mar. (Ky.) 202. But see Mooers v. Bunker, 29 N. H. 420; Reynolds v. Staines, 2 C. & K. 745; Murietta v. Wolfhagen, 2 id. 744.

[2] Roden v. Ryde, 4 Q. B. 626; Hamber v. Roberts, 7 C. B. 861; Barker v. Stead, 3 C. B. 946; Whitelocke v. Musgrove, 1 C. & M. 511; Jones v. Jones, 9 M. & W. 75.

sumption is rebuttable, it is sufficient to shift the burden of proof to the other side.[3] Thus, it has been held that two certificates for vacant land granted in the same name will be presumed to have been granted to the same person.[4] But, if required, some evidence beyond that of mere identity of name must be given that the plaintiff is the same person who is entitled to an interest in real estate.[4] When the names of the grantee in one conveyance and the grantor in a later conveyance of the same land are the same, their identity is *prima facie* sufficiently proved, although the residences are different.[6] But this presumption of identity of person from identity of name may be overcome by proof that there is more than one person by that name or that the name is a common one.[7] Of course the strength of this presumption is increased when there is not only identity of name, but also of profession and place of abode or of age.[8] Mere *similarity* of name is no proof of identity of person. Thus the question whether R. P. O'Neil, who executed the deed, and Rev. P. O'Neil, who owned the land, were the same person, was held to have been erroneously submitted to the jury without some proof of identity beyond that named,[9] and it cannot be presumed that "John O'Shea," named in a land patent, is the same person as "John O. Shea," named in a subsequent judgment concerning the same property.[10]

Sec. 62. Abandonment.

An abandonment of a right is never presumed,[11] but must be proved as a fact,[12] except where the right has been permitted to lie dormant, without assertion, for more than twenty years.[13]

[3] Estate of Williams, 128 Cal. 552, 61 P. 670, 79 Am. St. Rep. 67.
Wilson v. Holt, 83 Ala. 520, 3 So. 321, 3 Am. St. Rep. 768.

[4] Cates v. Loftus, *ante*.

[5] Moers v. Bunker, 29 N. H. 420.

[6] Geer v. Missouri L. & M. Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489.

[7] Jones v. Jones, *ante*. In McWinn v. Whelan, 27 Cal. 300, it was held that where a certificate of sale by a tax collector is to Michael Dundon and the deed is to Patrick Michael Dundon, Jr., it will not be presumed that the same person is meant in both instruments, especially when it is proved that there are two persons by the name of Dundon, one of whom is Michael and the other Patrick Michael.

[8] Smith v. Henderson, 9 M. & W. 798; Russell v. Smith, 9 id. 818; Simpson v. Dinsmore, 9 id. 47.

[9] Burford v. McCue, 53 Penn. St. 427.

[10] Clary v. O'Shea, 72 Minn. 105, 71 Am. State Rep. 465, 75 N. W. 115.

[11] Oneamuno v. The Much Sam, &c., Co., 1 Nev. 215; State v. Atkinson, 24 Vt. 448; White v. Halliday, 11 Tex. 606.

[12] Green v. Forbene, 2 La. An. 957.

[13] Geiger v. Miller, 24 Penn. St. 109.

Sec. 63. Presumption arising from Possession of Real Estate.

As men usually own the property they possess, mere proof of possession is *prima facie* proof of ownership,[1] and this applies both to personal and real estate, and possession of the latter raises a presumption of a seisin in fee,[2] and in the case of a mere trespasser this presumption is conclusive.[3] And in ejectment, although it is an inflexible rule that the plaintiff must recover by the strength of his own superior title, yet proof of possession of the land, for however short a time, is *prima facie* evidence of title against a wrong-doer,[4] provided the plaintiff had possession at the very time when the disturbance occurred, and that he has suffered a real disturbance either in fact or at law.[5] In some cases, it is held that it will be presumed that the fee simple of the land will carry with it the minerals,[6] but this presumption is not universal, because, in mining districts, the right to the minerals and the fee simple to the soil are in different persons; consequently this presumption may be rebutted by showing either an absence of enjoyment of the minerals by the owner of the soil, or an actual use of the minerals by a stranger.[7] The value of the presumption of title arising from possession, depends largely on proof of uninterrupted en-

[1] Webb v. Fox, 7 T. R. 397; Sulton v. Buck, 2 Taunt. 302; Robertson v. French, 4 East, 130.

[2] Jayne v. Price, 5 Taunt. 326; Doe v. Coulthred, 7 Ad. & El. 239; Doe v. Penfield, 8 C. & P. 537.

[3] Elliott v. Kemp, 7 M. & W. 312.

[4] Hoey v. Furman, 1 Penn. St. 295; Asher v. Whitelock, L. R. 1 Q. B. 1; Doe v. Dyehall, 3 C. & P. 610; Hutchinson v. Perley, 4 Cal. 93. But the possession must be actual, Bord v. Rollings, 30 Cal. 408, and must be clearly defined so as to give the possessor exclusive possession. A mere *scrambling* possession is not sufficient. Page v. O'Brien, 36 Cal. 559. The rule may be said to be that a prior possession of less than twenty years will prevail against a subsequent possession for less than twenty years. Crockett v. Morrison, 11 Mo. 3; Smoat v. Lecolt, 1 Stew. (Ala.) 590; Den v. Sinnickson, 9 N. J. L. 149; Jackson v. Harder, 4 John. (N. Y.) 202; Watkins v. Woolfalk, 5 Ga. 261.

[5] Lane v. Gould, 10 Barb. (N. Y.) 254; Millard v. Richard, 13 La. An. 572; Owen v. Fowler, 24 Cal. 192.

Thus, in an English case, Doe v. Coake, 7 Bing. 346, the lessor of the plaintiff proved that he had formerly held possession for over twenty-three years, and during that time had received and increased the rent, and it was held that the defendant could not rebut the presumption of a seisin in fee arising from these unequivocal acts of ownership, by showing that he, himself, had subsequently been in possession for a period *less* than twenty years, for the presumption being thus met by a presumption, the defendant was bound to establish a title of a higher description or the plaintiff's title must prevail.

[6] Hodkinson v. Fletcher, 3 Doug. 31. So also as to the subjacent strata. Keyse v. Powell, 2 E. & B. 132; Smith v. Lloyd, 9 Exch. 562.

[7] Rome v. Grenfel, Ry. & M. 396; Rome v. Brenton, 8 B. & C. 737.

joyment *for a long time,* and in one case eight years,[8] and in another seven years[9] were held sufficient. Where, however, the plaintiff relies upon a title by adverse possession, nothing short of an uninterrupted adverse occupancy for the entire statutory period will suffice;[10] but when, as he may do, he rests his case upon the common law presumption, or a lost grant, a possession for a period less than that fixed by statute will, when coupled with other circumstances, warrant a verdict in his favor.[11] And, generally, where rights have been peaceably exercised in a particular manner for a long time, it is only reasonable to presume that they had a legal origin.[12] Evidence that certain persons occupied as tenants of a town is evidence of possession in the town on which a claim of title by adverse possession may be founded.[13]

In an action for an injury to a reversion, proof of a receipt of the rent of the premises by the plaintiff, will, unless the annual sum is so small as to raise the presumption that it is a mere quit rent, be sufficient evidence of his title to the reversion, except as against the *real owner* and those claiming under him.[14] There is a presumption in favor of the holder of the record legal title which must be overcome by a clear preponderance of evidence,[15] but no presumption arises on the execution of a mortgage that the mortgagor owns the property therein described.[16]

Sec. 64. Presumption of Lost Grant. Adverse Possession.

After peaceable and uninterrupted adverse possesion of land for the period provided by statute for acquiring the title to land by adverse possession, a grant will generally be presumed.[1] But in such cases mere length of possession, however great, unless the possession is for a period as long as that required by the statute to constitute a bar, will not be sufficient. *But where there has been a*

[8] Jackson v. Harder, 4 John. (N. Y.) 202.

[9] Watkins v. Woolfalks, 5 Ga. 261.

[10] Lame v. Carpenter, 6 Exch. 825; Eldredge v. Knott, 1 Cowp. 214.

[11] Hunmer v. Chance, 4 DeG., J. & S. 625; Bright v. Walker, 1 C., M. & R. 222.

[12] Rex v. Powell, 3 E. & B. 377; Mayor of Hull v. Horner, 1 Camp. 110.

[13] Murphy v. Comm, 187 Mass. 361, 73 N. E. 524.

[14] Dainty v. Bracklehurst, 3 Exch. 207; Doe v. Johnson, Gaw. 173; Reynolds v. Reynolds, 12 Ir. Eq. 172.

[15] Drees v. Drees (Iowa, 1905), 104 N. W. 479.

[16] Syck v. Bossingham, 120 Iowa, 363, 94 N. W. 920.

[1] Rooker v. Perkins, 14 Wis. 79; Brundt v. Ogden, 1 John. (N. Y.) 156.

long and peaceable possession of land consistent with the grant to be presumed, and there are other circumstances which make it reasonable to believe that such grant was actually made, but through great lapse of time or other circumstances the evidence of such grant is probably lost or destroyed, then the length of possession *and the auxiliary circumstances* should be allowed to go to the jury, and they should be permitted to pass upon the question whether a grant has been made or not.[2] But such presumption may be repelled by parol proof where the presumption is raised by parol evidence,[3] or by the production or proof of the contents of an instrument under which the possession was held, which repels the presumption of a grant.[4] In order to raise the presumption of a grant from long possession, it is not necessary that the possession should have always been in the presumptive grantee.[5] In order to warrant a jury in presuming a grant, it is not necessary that they should find that a deed or grant has been actually executed, but without really believing that a grant has been made, they may presume its existence for the purpose of quieting title.[6] Such presumptions, however, of conveyance of corporeal hereditaments are seldom made, except when a title has been shown by the party who calls for the presumption, *which is good in substance,* but is lacking in some collateral matter necessary to make it complete in form,[7] or where the law has vested the title in him by adverse possession. While the presumption of a grant from the State will not be made from a simple occupancy sufficient to acquire a title by adverse enjoyment, as against an individual, yet it seems now to be well settled that, *where the adverse claim could have had a legal commencement,* a legal commencement may be presumed after long-continued peaceable enjoyment, accompanied by the usual acts of ownership.[8] Adverse possession, to be effec-

[2] Townsend v. Downer, 32 Vt. 183.

[3] English v. Register, 7 Ga. 387.

[4] Nieto v. Carpenter, 21 Cal. 455. See, also, Farrar v. Merrill, 1 Me. 17; Hurst v. McNeil, 1 Wash. (U. S.) 70; Jefferson Co. v. Ferguson, 13 Ill. 33.

[5] Glass v. Gilbert, 58 Penn. St. 266.

[6] Eldridge v. Knott, 1 Cow. 214; Deeble v. Linehan, 12 Ir. L. R., N. S. 1; Williams v. Donell, 2 Head. (Tenn.) 695.

[7] Doe v. Cooke, 6 Bing. 179.

[8] Mayor of Hull v. Horner, 1 Cowp. 102; R. v. Brown, cited 1 id. 110; Mather v. Trinity Church, 3 S. & R. (Penn.) 509. In McCarty v. McCarty, 2 Strobh. (S. C.) 6, it was held that, though an act of the legislature after twenty years' possession and use may be presumed yet that the principle is exclusively confined to cases in which the legislature *might act, and cannot apply where, from the constitution or a sort of common law of the State, the legisla-*

tive, must be, (1) hostile or adverse, (2) actual, (3) visible, notorious, and exclusive; (4) continuous, (5) under a claim of title.[9] Grants of charters and acts of the legislature even have thus been presumed and found by juries.[10] And upon the same principle the long enjoyment of duties, tolls, etc., if the nature of the case admits of it, has been held to warrant the presumption of any facts necessary to give them validity.[11] And it has even been held that a series of acts of ownership exercised by an adjoining owner upon the seashore for a long period of time afford sufficient evidence for a jury to presume a grant from the sovereign to one of his ancestors.[12] A right by grant to easements and incorporeal hereditaments may be presumed from an adverse user for the period fixed by statute for the acquisition of a title to land by adverse user.[13] Thus, by such adverse user the right to a private way is acquired, the presumption being from such adverse and undisturbed user that the right passed to the person using it by a regular grant,[14] and the same rule applies to all species of easements and incorporeal rights to which the Statute of Limitations does not apply. But such a presumption does not necessarily arise from mere length of possession in reference to corporeal subjects, as lands and tenements, because in reference to them the Statute of Limitations has made all the provisions which the law deems necessary for quieting the title. But, as has already been stated, length of possession *may, in connection with other circumstances,* be proved to perfect the evidence of title to lands, *and the longer the possession, the stronger is the presumption.*[15] But a

ture never has acted and never will act.

[9] Roby v. Calomet. & C. Canal & Dock Co., 211 Ill. 173, 71 N. E. 822.

[10] Mayor of Hull v. Horner, *ante;* McCarty v. McCarty, *ante;* Palmer v. Hicks, 6 John. (N. Y.) 33; Grimes v. Bastrop, 26 Tex. 310; Taylor v. Watkins, 26 id. 688; Walker v. Hanks, 27 id. 535; Lopez v. Andrews, 3 M. & R. 329 *a;* Att'y-Gen. v. Emeline Hospital, 17 Beav. 366; Devine v. Wilson, 10 Mo. P. C. 527.

[11] Mayor of Exeter v. Warren, 1 Q. B. 801; Gaun v. Free Fishers of Whitstoph, 20 C. B., N. S. 1; Mills v. Mayor of Colchester, L. R., 2 C. P. 476; Bryant v. Foot, L. R. 2 Q. B. 161; Lawrence v. Hitch, 3 id. 352.

[12] Beaufort v. Mayor of Swansea, 3 Exch. 413; Malcomson v. O'Dea, 10 H. L. Cas. 593; Shephard v. Payne, 3 N. R. 580; Pelham v. Pickersgill, 1 T. R. 66. In Archer v. Sadler, 2 H. & M. (Va.) 370, a quiet possession of sixty years; in Hunks v. Tucker, Tayl. (N. C.) 157, of forty years, and in Allston v. Saunders, 1 Bay (S. C.), 26, forty-seven years was held sufficient to raise a presumption of such a grant.

[13] Hill v. Crosby, 2 Pick. (Mass.) 466; Livett v. Wilson, 3 Bing. 115.

[14] Com. v. Low, 3 Pick. (Mass.) 408; Wright v. Freeman, 5 H. & J. (Md.) 497.

[15] GOULD, J., in Sumner v. Child, 2 Conn. 629.

possession of lands for a *less* time than that fixed by the statute for quieting the title will not raise a presumption of a grant, because it would amount to an evasion of the statute.[16] But when an *actual* transfer of title is to be made out, of which the deed or other documentary evidence has been lost, is relied upon, and is to be made out either in whole or in part by secondary evidence, length of possession, like any other circumstantial fact, is admissible as *corroborative* evidence of such transfer, and is no more material to the main fact than any other supposable circumstance; and possession for a *shorter* time than that prescribed in the Statute of Limitations is admissible, although, as previously stated, the longer the possesion, the stronger is the presumption arising from that fact.[17] "But," says GOULD, J., in the case last cited, "where length of time is relied upon *as a presumptive bar,* that is, where mere length of possession is the only fact required to be proved, and is *of itself* the conclusive fact from which a title is to be peremptorily presumed, upon the principle of quieting possession, and whether an original title is actually believed to have existed or not, the subject in controversy always is, and must be, an incorporeal right."[18]

From a long-continued possession a conveyance to the occupant of land may be presumed,[19] and that all acts necessary to give it effect were done.[20] Especially is this the case where the occupant exercised all the acts of ownership, paid the taxes, etc.[21] Where there has been long possession of land under a deed by one who executes it as executor, a will will be presumed to have existed in order to confirm the title of the grantee;[22] and where a sale under a statute had been made by a trustee, and the grantee had been in possession for fifty years, it was held that the jury might presume that the trustee conveyed with license.[23] So, where there had been a similar possession under a deed executed by an agent, it was pre-

[16] Terrill v. Herron, 4 J. J. Mar. (Ky.) 516.

[17] GOULD, J., in Sumner v. Child, 2 Conn. 629.

[18] Gray v. Gardner, 3 Mass. 399; Bunce v. Walcott, 2 Conn. 27; McDonald v. McCall, 10 John. (N. Y.) 377.

[19] McNair v. Hunt, 5 Mo. 300. In this case 30 years. Newman v. Studley, 5 id. 291. In this case 26 years. Thompson v. Carr, 5 N. H. 510. A separate possession of lands held in common, raises a presumption that a partition deed was executed. Hepburn v. Auld, 5 Cr. (U. S.) 262.

[20] Brattle Square Church v. Bullard, 2 Met. (Mass.) 263; Valentine v. Piper, 22 Pick. (Mass.) 85.

[21] Cheney v. Watkins, 1 H. & J. (Md.) 527.

[22] Maverick v. Austin, 1 Bailey (S. C.), 59.

[23] Thompson v. Carr, 5 N. H. 510.

sumed that the agent was authorized to execute the deed.[24] So, where a deed was executed of lands sold for taxes, it was presumed that the requisite formalities were observed to give validity to the sale.[25] But this is not the case unless there has been long possession under the deed, and, where twenty-three years after the execution of a collector's deed, the grantee took possession for *five* years, it was held that no presumption as to the validity of the deed could be raised therefrom.[26] This presumption is made between private individuals, in favor of a party who has proved a right to the beneficial ownership of property, and *whose possession has been consistent with the existence of such a conveyance as is to be presumed, especially where his possession would have been unlawful except for such a conveyance.*[27] But where the original possession of the land may be accounted for without there having been a conveyance, it is proper for the jury to presume a conveyance or not, according to their belief;[28] and it seems that a conveyance may be presumed, even though by law deeds are required to be recorded, and the records afford no evidence of such a deed.[29]

[24] Jarboe v. McAtee, 7 B. Mon. (Ky.) 279.

[25] Cuttle v. Brockway, 24 Penn. St. 145.

[26] Richardson v. Dorr, 5 Vt. 9.

[27] Hammond v. Cooke, 6 Bing. 180.

[28] Fenwick v. Reed, 5 B. & A. 233.

[29] In Beauland v. Hurst, 1 Price, 475, there was an act for registering deeds and conveyances in the West Riding of Yorkshire, on which act the question arose, declaring that they shall be recorded, in order to protect the grantee against subsequent *bona fide* sales and mortgages. It is nearly the same as our general registry acts in the United States. In that case, a grant of coal in the West Riding of Yorkshire was sought to be presumed from circumstances. This was resisted on the ground that the registry alone should speak; and there was no registry. The omission was relied on as effectually repelling all presumption in the case. The point does not appear to have been decided. But the question at the trial was left to the jury by BAILEY, J., and on the argument at bar, Rex v. Long Buckby (7 East, 45) was cited, and appears to be conclusive, that such a case presents as fair a subject of presumption as any other. In the latter case an indenture of apprenticeship had been lost, and was to be proved by parol; but there was no evidence that it had ever been stamped, and no registry of that fact at the stamp-office, where it must have appeared, if there had been no irregularity. But after nearly twenty years, during which the indentures had been acted upon as valid, the court held that the evidence of non-registry was not sufficient *per se* to repel the presumption, but they would rather suppose that the paper had been stamped, and that the proper office had omitted the registry by mistake. This was a case where, without a stamp, the indentures would have been a nullity to all intents, and where, in the regular course of things, there must have been a registry. It was surely much stronger against the presumption than the omission to register a deed of conveyance. The latter was valid as against the party without registry; and the grantee being in possession, they would be valid against all the world, purchasers and mortgagees included. Gouverneur v.

The presumption of a conveyance, as well that all necessary formalities were observed in making it, may be rebutted by proof tending to a contrary conclusion,[30] and, while ancient deeds under which the grantee has entered into possession are to be upheld, although defective in form or execution,[31] yet a *title* cannot be presumed to have been perfected where deeds showing a *defective* title are produced[32] when the origin of the possession is accounted for without the aid of a grant, or conveyance, and it is consistent with the fact of there having been no conveyance, stronger evidence than mere possession is required to warrant a jury in finding that a conveyance has been made,[33] and this rule prevails where a right is claimed from *mere user*, without any trace of the commencement of it, the title being referable to prescription rather than a grant.[34]

A presumption of a grant, or conveyance, can only arise where there has been an exclusive occupancy as owner; and where the occupancy is casual and general and does not exclude the real owner, it cannot be raised,[35] nor can it be raised where there are circumstances which rebut it, as where the land occupied belongs to the State, or where the right exercised is one which the State

Lynch, 2 Paige Ch. (N. Y.) 300, 301, and the cases there cited. Neither are the registering acts imperative, nor is there, in case of a deed, any great danger in omitting to register. It is entirely optional with the party, and if purchasers or mortgagees are uninjured by lack of constructive notice, none others can complain. Where notice alone is the object, it is given by a change of possession to the grantee; and an absolute deed may ordinarily be withheld from the record, without any danger. Indeed, this is often so in practice. And it follows that there is nothing in the omission to register necessarily inconsistent with the common presumption which involves the previous existence and loss, and may equally well include the non-registry.

The law presumes a conveyance where there has been long-continued possession of land under a claim of title, and the parties are shown to have acted as though a deed had been given. Wendel v. Moulton, 25 N. H. 41. Over twenty years' possession is held in South Carolina to raise the presumption of a grant. Thompson v. Peake, 7 Rich. (S. C.) 353; Kimbrall v. Walker, 7 id. 422. The presumption of law is founded upon a fair presumption of fact, and is frequently resorted to to supply the place of lost deeds. Demeyn v. Legg, 18 Barb. (N. Y.) 14; Simpson v. Hyatt, 1 Jones L. (N. C.) 518; Spears v. Oakes, 4 Rich. (S. C.) 347. Adverse possession of the land must be shown before any presumption will be made in favor of the claimant. Wadsworthville School v. Meetze, 4 id. 50. Permissive possession will raise no such presumption. Roxbury v. Huston, 37 Me. 42.

[30] Chiles v. Conley, 2 Dana (Ky.) 21; Ladd v. Campbell, 32 Penn. St. 250.

[31] Hill v. Lord, 48 Me. 83.

[32] Owings v. Norwood, 2 H. & J. (Md.) 96.

[33] Fenwick v. Reed, 5 B. & Ad. 232; Blewitt v. Tregonning, 3 id. 544.

[34] Blewitt v. Tregonning, *ante*.

[35] Bethum v. Turner, 1 Me. 111.

only can grant,[36] nor where the right exercised is a common or natural right,[37] nor where it appears that the party might, if he chose to do so, produce the deed.[38]

Sec. 65. Validity of Official Acts.

Every officer acting under the sanction of an oath, or in whom the government reposes a trust, is presumed to have done his duty until the contrary is proved,[1] and he is also presumed to be competent to do his duty as otherwise it is assumed he would not have undertaken its execution. This circumstance may be considered by the court in determining whether the witness may be allowed to testify as an expert.[2] This principle applies not only to proceedings against an officer, but also to an action against the right of an individual derived through the act of such officer;[3] and a person who alleges a breach of official duty must show every fact necessary to establish such breach.[4] This rule is in accordance with and is embodied in the maxim, *Omnia praesumuntur rite esse acta,* and is regarded as one of the most important presumptions of the law.[5] When some preceding act or some pre-existing fact is necessary to the validity of an official act, the presumption in favor of the official act is presumptive proof of such preceding act or pre-existing fact. Upon the other hand, the presumption that an officer has done his duty cannot sustain his action where the mandatory requirements of the law concerning the record of such action are disregarded. And in any event such presumption merely furnishes a species of evidence that may be rebutted by proof.[6]

In obedience to this presumption, the burden is always upon the

[36] Rhodes v. Whitehead, 27 Tex. 304; Ashley v. Eastern R. R. Co., 5 Met. (Mass.) 368.

[37] Frazier v. Brown, 12 Ohio St. 294.

[38] Browne v. Thompson, 4 Q. B. 543.

[1] Sennett v. State, 17 Tex. 308; Hartwell v. Root, 19 John. (N. Y.) 345; Kelley v. Creer, 53 Penn. St. 302; McMahon v. Davison, 12 Minn. 357; Guy v. Washburn, 23 Cal. 111; Dawkins v. Smith, 1 Hill (S. C.), Eq. 369; Mercer v. Doe, 6 Ind. 80; Ellis v. Carr, 1 Bush (Ky.), 527; Jenkins v. Parkhill, 25 Ind. 473; Schermerhorn v. Talman, 14 N. Y. 43; Kimball v. Lamprey, 19 N. H. 409; Walley v. Calloway Co. Court, 1 Mo. 447; Tademeir v. Aspinwall, 43 Ill. 401; Hancock v. Eastern River Lack., &c., Co., 20 Me. 72; Leas v. Polk Copper Co., 21 How. (U. S.) 493.

[2] State v. Main, 69 Conn. 123, 37 A. 80, 61 Am. St. Rep. 30.

[3] Hickman v. Boffman, 1 Hard. (Ky.) 348.

[4] Craig v. Adair, 22 Ga. 373.

[5] Taylor on Ev. (7th ed.) 156.

[6] Lauve v. Wilson (La., 1905), 38 So. 522.

party alleging it, to show a neglect of official duty[7] or irregularity in its performance.[8] Thus, if a clerk of court has no authority to administer an oath out of court, jurats attached to papers signed by him as clerk will be presumed to have been verified in court.[9] So where an officer is required by law to give notice of certain facts, it will be presumed that he gave such notice;[10] or where the law requires that certain facts should be established before he does certain acts, or permits them to be done, that the proper evidence was furnished him;[11] or when he does a certain act which would be a violation of duty unless certain terms or conditions had been performed, it will be presumed that such conditions were performed.[12] But as the power to take oaths to affidavits is not one of the common law powers of a notary public and is conferred only by legislative enactment the court will not presume in the absence of evidence that a notary public in another State had authority to take such oaths and his authority must be proved like any other fact.[13] Where an officer is required by law to do certain acts before he enters upon the discharge of his duties, as to be sworn,[14] to give bonds, etc.,[15] after he has entered upon the discharge of such duties, it will be presumed not only that he was duly appointed, but also that he had complied with all the statutory requirements,[16] although there is nothing in the records[17] or in the returns made by him to show the fact.[18] But this presumption will not be permitted to sustain a vital jurisdictional fact,[19] nor to sustain acts done by him outside of or contrary

[7] Dobbs v. Justices, &c., 17 Ga. 624.

[8] Palmer v. Boling, 8 Cal. 384; State v. Howard, 10 Iowa, 101; Russell v. Beebe, Hempst. (U. S. C. C.) 704; Ross v. Read, 1 Wheat. (U. S.) 482; Minter v. Cromelin, 18 How. (U. S.) 87; United States v. Arredondo, 6 Pet. (U. S.) 691.

[9] Schermerhorn v. Talman, 14 N. Y. 93.

[10] People v. Phenix Bank, 4 Bos. (N. Y.) 363.

[11] Forsaith v. Clark, 21 N. H. 409; Hart v. Young, 3 J. J. Mar. (Ky.) 408; Webber v. Gottschalk, 15 La. An. 376.

[12] Titus v. Kimbro, 8 Tex. 210; Lackawanna Iron Co. v. Fales, 55 Penn. St. 90; Kilpatrick v. Frost, 2 Grant's Cas. (Penn.) 168. In Shorey v. Hussey, 32 Me. 579, it was held that, where the law required an officer serving a writ of replevin to take a replevin bond, it will be presumed that he took such bond, although his return upon the writ does not show the fact.

[13] Teutonia Loan, etc., Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

[14] Nelson v. People, 23 N. Y. 293.

[15] Hutchings v. Van Bokkelin, 34 Me. 126.

[16] Jones v. Minisbach, 26 Tex. 235; McCutchen v. Pratt, 22 Wis. 561.

[17] State v. Halstead, 18 N. H. 59.

[18] Shorey v. Hussey, *ante;* Alleghany v. Nelson, 25 Penn. St. 332.

[19] Sheldon v. Wright, 7 Barb. (N. Y.) 39.

to the usual and well recognized functions and duties of his office.[20] But where the act is within the functions of his office, it will be presumed that all preliminary steps requisite to give validity to his acts had been taken,[21] unless upon the face of a return or report made by him, or of a record of his proceedings, there is something which repels such a presumption.[22]

The general rule universally applied in all civilized countries, is that acts which purport to have been done by public officers in their official capacity, and within the scope of their duty, will be presumed to have been regular and in accordance with their authority, until the contrary appears.[23] Thus, if an appropriation by the city council was necessary as a preliminary to a transfer of municipal funds from one account to another, the fact that the transfer was officially made by the custodian would give rise to the presumption that the necessary action of the city council had been taken, and would cast the burden of proof on the one disputing the legality of the transfer.[24] Thus it will be presumed in the first instance that municipal authorities have complied with all the formalities of the law in making contracts;[25] that officers have complied with the law in the drawing of jurors;[26] that an assessment was made at the proper time;[27] that all entries, including those upon the margin, and cancellations or interlineations not amounting to a mutilation, in public records, were regularly and honestly made.[28] So, where the statute requires that a seal must be attached to a sheriff's deed to make it valid, a court is precluded from presuming that it was once sealed, by an answer alleging that the sheriff omitted the seal by mistake.[29] So, while a general return by an officer, "executed," will raise a presumption that the process was rightly executed, yet, if the *manner* of its execution is set forth, its accuracy may be inquired into by the court.[30] But in all cases where the return of an officer is attacked,

[20] Jones v. Minisbach, 26 Tex. 235; Houston v. Perry, 3 Tex. 390.

[21] New Orleans v. Halpin, 17 La. An. 185; Palmer v. Boling, 8 Cal. 384; State v. Howard, 10 Iowa, 101; Plank Road Co. v. Bruce, 6 Md. 457.

[22] Moreau v. Branham, 27 Mo. 351; Ward v. Barrows, 2 Ohio St. 241.

[23] Ross v. Reed, 1 Wheat. (U. S.) 482; Dunlop v. Munroe, 1 Cr. (U. S. C. C.) 536; United States v. Arredondo, 6 Pet. (U. S.) 691; Nimter v. Crommelin, 18 How. (U. S.) 87.

[24] Pine Tree Lumber Co. v. City of Fargo, 12 N. D. 360, 96 N. W. 357, 365.

[25] New Orleans v. Halpin, 17 La. An. 185.

[26] State v. Howard, 10 Iowa, 101.

[27] Palmer v. Boling, 8 Cal. 484.

[28] Rice v. Cunningham, 29 Cal. 492.

[29] Moreau v. Branham, *ante*.

[30] Case v. Calston, 1 Met. (Ky.) 145. In Drake v. Mooney, 31 Vt. 617, where an officer stated in his return upon an execution, that he advertised

the burden of establishing the falsity of any of the matters recited therein is upon the party attacking it.[31]

Where a return of a survey of lands is made by officers appointed for that purpose, having every appearance of regularity, it will be presumed to be regular until the contrary is proved,[32] and cannot be questioned by a mere trespasser;[33] and if, in making a survey, they remove monuments established under a former survey, it will be presumed that the former survey was wrong and that the latter one is right.[34] Such surveyor's knowledge of the art of surveying need not be shown, as, from the circumstance of his appointment, it will be presumed.[35]

An agreement of counsel made in the course of a cause will be presumed to have been made on proper authority from the client.[36] So, that a sheriff selling horses on execution had levied on them.[37] So, that overseers of the poor have taken the proper steps for the relief of a pauper;[38] that a board of supervisors have complied with the law in its proceedings to erect a new town;[39] that officers of government would not twice survey and patent the same lands;[40] that an assessed tax on certain land was imposed upon the possessor at the time, or other person bound legally to pay;[41] that a district attorney has filed the transcript of a conviction in the Court of Exchequer as required by statute;[42] that a register's sale was duly advertised;[43] that a sheriff's sale was according to his duty;[44] that he returned the execution in due time;[45] that he gave

the property as the law directs, and then proceeded to state the places in which it was advertised, the law requiring it to be advertised and sold in a public place, it was held that the court would presume that the places named were public places.

[31] Morse v. McCall, 13 La. An. 315. And the same rule prevails where a party claims that an officer has not discharged his duty. State v. Metton, 8 Me. 417.

[32] Harris v. Burham, 1 Wash. (U. S.) 191; Jewell v. Porche, 2 La. An. 148.

[33] Trotter v. President, &c., 9 Mo. 69.

[34] Wilder v. St. Paul, 12 Minn. 192. The presumption is of the correctness of an official survey, until the same is impeached. Watkins v. Havighorst, 13 Okl. 128, 74 Pac. 318.

[35] Ashe v. Lanahan, 5 Ind. 435.

[36] Ellworthy v. Bird, 1 T. R. 33.

[37] Hartwell v. Root, 19 John. (N. Y.) 345; Marsh v. Lawrence, 4 Cow. (N. Y.) 461.

[38] Minklaer v. Rockfeller, 6 Cow. (N. Y.) 276.

[39] People v. Carpenter, 24 N. Y. 86.

[40] Woodson v. Bufford, 7 Mon. (Ky.) 418.

[41] Rex v. Inhabitants of St. Lawrence, 4 Doug. 190; Rex v. Inhabitants of St. James, 4 Doug. 200.

[42] Hilts v. Colvin, 14 John. (N. Y.) 182.

[43] Hickman v. Skinner, 3 Mon. (Ky.) 211.

[44] Terry v. Bleight, 3 Mon. (Ky.) 271.

[45] Maury v. Cooper, 3 J. J. Marsh. (Ky.) 226.

due notice of sale;[46] that he held a *ca. sa.* the proper length of time to charge bail.[47] That a rector in possession had read the thirty-nine articles, will be presumed.[48] So, that a man acting in a public office has been rightfully appointed, as one acting as a surrogate.[49] So, that entries made in public books were made by the proper officers; that officers issuing a land patent had the requisite warrant, plat and certificate;[50] that a government surveyor did his legal duty by surveying on the ground.[51] A record stated a tax to have been reported as assessed; this will be intended to be the report of the man who was sheriff at the time it was assessed, as the duty belonged to him.[52] So, that the auditor of the exchequer, on his removal, had delivered up the rolls.[53] So, that a constable delivering an execution for renewal, held it long enough to levy and collect according to law;[54] that a tax collector sold no more land than was necessary to pay the tax;[55] that the certificate of appraisal was in the hands of the sheriff before he set off the land under the *fi. fa.*;[56] and that an officer commissioned by the governor was duly nominated.[57]

In one case, where a sheriff received money on a *fi. fa.* after the return day, having received one installment before, the court were asked to presume that he levied on the debtor's property before the return day, which act alone could give him power officially to receive money afterwards; but they would not presume that, saying, that where a fact is necessary to confer authority, it is not to be presumed, although every proper official step will be presumed after authority is shown.[58]

Sec. 66. Jurisdiction of courts.[1]

This presumption as to the regularity of official acts, so far as the action of courts of record is concerned, especially as to their

[46] Hanson v. Barnes, 3 G. & J. (Md.) 359.
[47] Wheelock v. Hall, 3 N. H. 310.
[48] Monk v. Butler, 1 Roll. 83. And see 2 Amst. 372.
[49] Rex v. Verelst, 3 Camp. 432. And see Bishop v. Cone, 3 N. H. 513, and People v. Gilbert, Anth. N. P. (N. Y.) 191.
[50] Hickman v. Boffman, Hard. (Ky.) 362.
[51] Phillips v. Robertson, 2 Tenn. 421.
[52] Bush v. Williams, 1 Coke, 360.
[53] Lord Halifax's Case, Bull. N. P. 298.
[54] Wilson v. Gale, 4 Wend. (N. Y.) 623.
[55] Ives v. Lynn, 7 Conn. 505.
[56] Booth v. Booth, 7 Conn. 350.
[57] Commonwealth v. Frazier, 4 Mon. (Ky.) 513.
[58] Rudd v. Johnson, 5 Litt. (Ky.) 19.
[1] As to presumption of regularity in judgments, see *post*, § § 222-224.

jurisdiction, where there is nothing on the face of the record to defeat it, is conclusive.[2] But in a great majority of instances it may be controverted, and only operates as *prima facie* proof. In accordance with this rule, a court which has taken jurisdiction of a case is presumed to have had before it proper evidence of the facts necessary to give jurisdiction, and evidence of the contrary will not, after the lapse of time, be admitted.[3] It will be presumed after the lapse of a long period of time that a verdict and judgment were founded upon proper proceedings including a declaration duly filed although no declaration or a record of it could be found in the clerk's office. It is far more likely that the papers were misplaced and that the clerk failed to perform his duty than that the judge would have allowed a verdict and judgment without the necessary pleadings upon which to base the same.[4] In a case of a judgment of a court of general jurisdiction every fact not negatived by the record must be presumed to support the judgment,[5] and this presumption of regularity in judicial proceedings extends to proceedings under a special statute.[6] Where it appears that a party has been convicted in a foreign jurisdiction, in the absence of the record of the criminal proceedings the presumption is that such proceedings were regular and within the jurisdiction of the court.[7] But in the case of courts of limited jurisdiction, where the transaction is recent, the facts necessary to give it jurisdiction should appear.[8]

But when the jurisdiction of an inferior tribunal is established, the maxim, *Omnia praesumuntur rite esse acta,* applies to all its

[2] Peacock v. Bell, 1 Wm. Saund. 74; Butcher v. Bank of Brownsville, 2 Kan. 70. When an entry of judgment is so made that its terms are applicable to a case in which the court had no jurisdiction, as well as to one within its jurisdiction, it will be presumed that it acted within its jurisdiction. Bumpus v. Fisher, 21 Tex. 561.

[3] Sprague v. Litherberry, 4 McLean (U. S.), 442; Grimstead v. Foote, 26 Miss. 476.

[4] Wiggins v. Gillette, 93 Ga. 20, 19 S. E. 86, 44 Am. St. Rep. 123.

[5] Kalb v. German Savings, etc., Society, 25 Wash. 349, 65 P. 559, 87 Am. St. Rep. 757.

[6] In re Marchant's Estate, 121 Wis. 526, 99 N. W. 320, statute providing for establishment of heirship.

[7] Coveney, v. Phiscator, 132 Mich. 258, 93 N. W. 619.

[8] Goulding v. Clark, 34 N. H. 148. A board of aldermen, sitting as a court to try charges against a city officer, is a court of limited jurisdiction, and everything necessary to make it such a court must be affirmatively shown, and no presumption can be made in its favor. Lampert v. Lithgow, 1 Bush (Ky.), 176. That this presumption does not apply in the case of courts exercising a special or merely statutory jurisdiction, see Graham v. Whitley, 26 N. J. L. 254; Swain v. Chase, 12 Cal. 283.

proceedings, as well as to courts of general jurisdiction,[9] and it will be presumed that it acted rightly.[10] Thus, where the evidence failed to show, affirmatively, that an administrator's bond was approved, in writing, by the judge of probate, and the contrary did not appear,—the case disclosing that all the other necessary steps were taken with strictness and accuracy; that the sale was public; that the purchaser entered immediately and held the premises for more than 20 years; that the law required such approval before the bond could be filed, and that the bond was actually filed,—the law fully authorized the conclusion that all was done which was required to give the purchaser a perfect title.[11] So, where a license has been granted, it is presumed that the court had the proper evidence before it.[12] So, where a letter of guardianship, regular on its face, is issued by a court having jurisdiction in the premises, it will be presumed that all the necessary preliminary requirements have been complied with, and that it was legally issued.[13] So, where a bond has been given, which the law requires should be approved by the court, such approval will be presumed, even though there is no written memorandum thereof on the bond.[14] It is presumed that a court of record of another State had jurisdiction of the subject-matter in controversy;[15] but such a presumption will not be made where there is evidence to the contrary, nor where the record fails to show notice to the defendant.[16]

Sec. 67. Regularity of Appointment of Officers.

If a person acts as a public officer, as a magistrate, judge, etc., proof of such fact is *prima facie* evidence that he was duly elected or appointed to such office,[1] and that he had the requisite authority as such to do the acts in question,[2] and has complied with all the

[9] State v. Hinchman, 27 Penn. St. 479.

[10] Outlaw v. Davis, 27 Ill. 467; McGreers v. McGreers, 1 S. & P. (Ala.) 30; Merritt v. Baldwin, 6 Wis. 439; Thorp v. Com., 3 Met. (Ky.) 411; State v. Farrish, 23 Miss. 483. This presumption applies to proceedings in a probate court. Richmond v. Hudenson, 18 Ark. 449.

[11] Austin v. Austin, 50 Me. 74.

[12] Com. v. Bolkom, 3 Pick. (Mass.) 281.

[13] Den v. Gaston, 25 N. J. L. 615; S. P. State v. Lewis, 22 id. 564; Cromelieu v. Brink, 29 Penn. St. 522; Morgan v. State, 12 Ind. 448.

[14] Cromelieu v. Brink, *ante*.

[15] Buffum v. Stimpson, 5 Allen (Mass.), 591.

[16] Com. v. Blood, 97 Mass. 438.

[1] Rex v. Verelst, 3 Camp. 432.

[2] Uray v. Hoyapanubby, 18 Miss. 452; Shelbyville v. Shelbyville, 1 Met. (Ky.) 52; Devall v. Chappin, 15 La. An. 566; Landry v. Martin, 15 id. 1.

requirements of the statute as conditions precedent to entering upon the discharge of their duties.[3] Consequently it is sufficient *prima facie* evidence to show that a person acted as a public officer without proof either of his appointment or election, and the burden is upon the person questioning his right to act as such, to prove that he had no authority to act as such, and this applies to attorneys,[4] justices of the peace, constables, ministers of the gospel,[5] officers of any branch of the revenue, or indeed any *public* officers. The testimony of men who were formerly street commissioners is competent to prove them such. Parol proof that a certain act appertaining to a particular public office was done by a man in possession of the office acting in the capacity of such officer is competent evidence to show *prima facie* that the act was official.[6] Thus proof that a person acted as sheriff,[7] deputy sheriff, commissioner for the taking of depositions,[8] master in chancery,[9] or indeed in *any* public office, is, in general, sufficient proof of his authority to do so, until the contrary is proved; and this rule obtains as well in actions *in favor* of a public officer as in those *against* him.[10] In an early New York case[11] the defendant justified the taking of property as deputy sheriff under an execution, and on

[3] Nelson v. People, 23 N. Y. 293; Kilpatrick v. Froot, 2 Grant's Cas. (Penn.) 168; Lackawanna Iron Co. v. Fales, 55 Penn. St. 90. The rule is, in reference to acts of officers, where certain conditions precedent are asserted, that, when an officer does an act which would be a violation of duty unless certain terms or conditions had first been performed, such performance will be presumed as between the individual and the State, to have taken place. Titus v. Kimbro, 8 Tex. 210. And the same rule prevails as to conditions precedent to be performed by an officer before he enters upon the discharge of his duties, and it will be presumed that he was duly appointed or elected and qualified in cases in which he is a party to the record, if it is shown that he has previously acted in the discharge of the duties of such office; and this presumption remains until it is removed by evidence. Hutchings v. Von Vokkelen, 34 Me. 126. And it would be obviously impolitic and inconvenient to throw upon parties the burden of showing, in the first instance, that public officers, upon whose acts they rely, were duly authorized or qualified to perform the act.

[4] Berryman v. Wise, 4 T. R. 366; Brown v. Mims, 2 Const. Rep. (S. C.) 235; Pearce v. Whale, 5 B. & C. 38.

[5] Goshen v. Stonington, 4 Conn. 209. As to justices and constables, see Berryman v. Wise, 4 T. R. 366; Rex v. Gordon, 1 Lea. C. C. 515; Turner v. Fendall, 1 Cranch (U. S.), 117.

[6] Conner v. City of Nevada (Mo., 1905), 86 S. W. 256.

[7] Bunbury v. Matthews, 1 C. & K. 382.

[8] James v. Brown, 5 B. & Ald. 243; R. v. Howard, 1 M. & R. 187; R. v. Newton, 1 C. & K. 480.

[9] Butler v. Ford, 1 C. & M. 662.

[10] Cannell v. Curtis, 2 N. Cas. 228; M'Gahey v. Alston, 2 M. & W. 211.

[11] Porter v. Luther, 3 John. (N. Y.) 431.

trial offered to prove himself a general deputy of the sheriff, by reputation; the justice rejected the evidence, and required him to produce his appointment, and upon *certiorari*, the judgment was reversed upon this ground. The same principle has been applied to the case of magistrates. Thus in a Connecticut case[12] it appeared that a certain person had been appointed a justice of the peace, and to prove that he was duly qualified to act, a witness was offered to prove that he had issued a writ and received the duty upon it. This was held competent as *prima facie* proof, although the writ was not produced. So where a deed was produced which was acknowledged before a person styling himself a justice of the Common Pleas, it was held that it would be presumed that he was such, until the contrary was proved.[13] So, where a person executed a warrant directed to him as coroner, it was held that this was sufficient proof of his authority without the production of his commission.[14] So the celebration of a marriage by a person styling himself a minister of the gospel is *prima facie* proof of his authority to do so.[15] So, proof that the plaintiffs acted as officers of a revenue cutter was held sufficient, *prima facie*, in an action by them to recover their proportion of a forfeiture.[16] So it has been held that a person may be proved to be a collector and trustee of a school district by reputation;[17] and the same rule also applies to persons acting publicly as officers of a corporation.[18]

How far this rule applies to professional men, suing or being sued as such, is not very definitely settled. In the case of attorneys,[19] clergymen,[20] and surgeons,[21] recoveries for or against them in that capacity have been upheld upon proof that they *acted* in

[12] Vernon v. East Hartford, 3 Conn. 475. See also Turner v. Field, 1 Cranch (U. S.), 117.

[13] Willink v. Miles, 1 Pet. (U. S. C. C.) 429; Clinton v. Beardsley, 38 Barb. (N. Y.) 29. But where a person justifies in an action for false imprisonment, upon the ground that he was a justice of the peace, and acting in his official capacity, it has been held that he is required to prove that he is not only *de facto*, but also *de jure* a justice of the peace, and, as his official character is directly in issue, he must establish it affirmatively. Newman v. Tiernan, 37 Barb. (N. Y.) 159. As to *quo warranto* proceedings, see People v. Cooke, 8 N. Y. 67; People v. Pearse, 27 N. Y. 45.

[14] Young v. Com., 6 Binn. (Penn.) 88.

[15] Goshen v. Stonington, 4 Conn. 209.

[16] Lawyer v. Steele, 3 Wash. (U. S. C. C.) 464.

[17] McCoy v. Curtice, 9 Wend. (N. Y.) 17.

[18] United States Bank v. Dandridge, 12 Wheat. (U. S.) 70.

[19] Berryman v. Wise, 4 T. R. 366.

[20] Bevan v. Williams, 3 T. R. 635, *n.* (*a*).

[21] Gremaine v. Le Clerk, &c., 2 Camp. 144.

that capacity, without proof that they were so in fact. But Mr. TAYLOR, in his work upon Evidence, vol. 1, p. 182 (7th ed.), says: "These cases seem to rest not so much, if indeed at all, upon the presumption, as upon the ground that the opposite party had, by his admissions, either by word or deed, rendered it unnecessary to prove the actual appointment.[22] *In cases, therefore, where no such admission has been made,* the safer, if not the *necessary* course, will be to prove the appointment in the ordinary manner." Modern practice and recent decisions seem to require such proof. In an English case,[23] in an action brought by a physician for defamation, where the slanderous words *denied* the professional character of the plaintiff, proof that he had acted as such, coupled with evidence of a Scotch diploma, was held not sufficient to entitle him to a verdict. "No doubt," said Lord DENMAN, "a person complaining of a slander upon him in a particular character, must prove that he possesses that character when the slander does not admit it."

In the case last referred to, the court was equally divided upon the question whether proof of *acting* as physician was sufficient. But MANSFIELD and HEATH thought that the words of the slander, "Dr. Smith has upset all we have done, and die he (the patient) must," implied an admission of the character in which the plaintiff sued.[24]

[22] CHAMBERS, J., in Smith v. Taylor, 1 N. R. 210.

[23] Collins v. Carnigu, 1 Ad. & El. 695.

[24] It may be observed, however, on this case, that the question whether acting as a physician is sufficient *prima facie* proof of being one, was not directly decided, because the plaintiff, not content with resting his case on such evidence, proceeded to prove that he had received the degree of doctor of medicine from the University of St. Andrew's; and as the court held that this did not entitle him to practice in England, he could not, of course, fall back upon proof of practice upon the legality of which he himself had, by his evidence, thrown doubt. In another action of slander, brought by a collector of tolls, the plaintiff was nonsuited on failing to prove his appointment to that office, but it does not appear that any evidence was offered that he ever acted in that capacity. Sellors v. Till, 4 B. & C. 655. And the same observation applies to the cases of Savage, 1 Doug. 356, *n.* (4), and Cortis v. Kent Waterworks Co., 7 B. & C. 314, in the former of which the plaintiff, who sued as a barrister, relied, not on his practice, but on the book of the Society of Lincoln's Inn, containing the order for his call; and in the latter, a party, suing in the character of treasurer to certain commissioners, proved his appointment to the office. Still, these cases, though not direct authorities, tend to show what the practice has been, and so far support the view that the rule which renders evidence of acting *prima facie* proof of due appointment, is confined to cases where the parties occupy a *public* situation, or, perhaps, where the question of ap-

In such actions where the declaration states, as matter of inducement, that the plaintiff holds a certain office, or belongs to a certain trade or profession, no evidence is required to support the statement unless it is distinctly denied by the defendant's plea.

Enough has been said to illustrate the extent to which the rule is carried, and it is proper to say, with reference to the *effect* of this species of evidence, that, where the rights of third persons are concerned, it is generally sufficient for them to show that the officer through whom or by whose acts they claim, is so *de facto,* and the fact that he is not so *de jure* cannot be shown to defeat or prejudice their rights.[25]

As to the precise species of evidence necessary to show that a person is an officer *de facto,* which will preclude inquiry into the validity of his appointment or election, no definite general rule can be formulated from the authorities, as, from the nature of things, each case must largely depend upon its own peculiar circumstances. The mere claim to be a public officer, and the performance of a single, or even a number of acts in that character, will not necessarily in all cases constitute a person an officer *de facto,* but there must generally be some color of appointment or election, *or an acquiescence on the part of the public for a length of time which affords a presumption of such appointment or election.*[26] But where the person assuming to be an officer is himself a party to the suit, and the only individual to be injuriously affected by an inquiry into the validity of his official title, proof of acts by him as such officer is, *in his favor,* merely *prima facie* evidence of his being such.[27] But in actions *against* him, by proof of such acts, he is estopped from denying his official character.[28] It may be well

pointment is *not directly* at issue. The case of R. v. Jones, 1 Lea. C. C. 74, where, on an indictment against an apprentice for a fraudulent enlistment, it was held that the indenture must be proved, is an authority on neither side of this question, for that decision rested on the ground that, as the *actual and legal* binding was the fact which constituted the gist of the offense, this could only be proved by the best evidence.

[25] Doty v. Gorham, 5 Pick. (Mass.) 487; People v. Collins, 7 John. (N. Y.) 549; Wilcox v. Smith, 5 Wend. (N. Y.) 231; Mason v. Dillingham, 5 Mass. 170; Fowler v. Beebe, 9 John. (N. Y.) 231.

[26] Wilcox v. Smith, 5 Wend. (N. Y.) 231. See State v. Carroll, 38 Conn. 449, where it is held not necessary in all instances that there should be a color of appointment or election.

[27] Lawler v. Beebe, 9 Mass. 231; Cone v. Lawler, 10 id. 290.

[28] Hughes v. James, 3 J. J. Mar. (Ky.) 700.

here to say that an officer *de facto* is one whose acts, though he was not a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons; and this is done where the duties of the office were exercised: 1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be. 2. Under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent, requirement or condition, as to take an oath, give a bond, or the like. 3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. 4. Under color of an election or appointment by or pursuant to a public, unconstitutional law, before the same has been adjudged to be such.

The acts of an officer appointed by and acting under and pursuant to an unconstitutional law, performed before the unconstitutionality of the law has been judicially determined, are valid as respects the public and third persons, as the acts of an officer *de facto*.[29] In order to constitute a person such an officer he must be in the actual possession of the office and have the same under his control. If the officer *de jure* is in possession of the office—if the officer *de jure* is also the officer *de facto*—then no other person can be an officer *de facto* for that office. Two persons cannot be officers *de facto* for the same office at the same time.[30]

Sec. 68. Official Sales.

Where a public officer is required to sell property, either at public or private sale, and as a condition precedent thereto certain steps are required to be taken, it will be presumed that all such conditions were complied with before such sale was made.[1] Thus, in the absence of proof to the contrary, a sheriff, at a sale of land under an execution, will be presumed to have complied with the

[29] State v. Carroll, *ante*.

[30] M'Cahon v. Commissioners, 8 Kan. 437.

[1] Hewitt v. Stephens, 5 La. An. 640; Culbertson v. Milhollin, 22 Ind. 362.

requirements of the law in not selling more than was necesary to satisfy the execution, if the land was divisible.[2]

So where the record of a constable's sale is silent as to whether due notice was given of the sale or not, the court will presume that the constable did his duty.[3]

So, too, the presumption is that a sheriff who sells property on execution, has done his duty in previously making a levy, and the fact will be deemed to be admitted, if no objection is made at the trial;[4] and even where property is sold by a sheriff in another State, it will be presumed that the deed given is in conformity with the laws of that State, until the contrary is shown.[5]

Where a return shows a sale after appraisement, the latter will be presumed legal.[6]

So, too, although on a trial involving the validity of a tax sale, a part only of the requisite proofs are positive and direct, yet, if the suit is brought more than thirty years after the sale, the jury are at liberty to presume that the tax was duly authorized and assessed, and that all the other proceedings requisite to the validity of the sale were properly had.[7]

Sec. 69. Payment.

When the existence of a claim is once established, payment thereof is not presumed, except under peculiar circumstances, until after the lapse of twenty years. But the person pleading payment is bound to establish it,[1] and the mere circumstance that the creditor was poor or in embarrassed circumstances, and that the debtor was abundantly able to pay when the debt matured, will not of

[2] Banks v. Bales, 16 Ind. 423.

[3] Culbertson v. Milhollin, 22 Ind. 362.

[4] Smith v. Hill, 22 Barb. (N. Y.) 656.

[5] Sadler v. Anderson, 17 Tex. 245.

[6] Waddell v. Judson, 12 La. Ann. 13.

[7] Freeman v. Thayer, 33 Me. 76.

[1] Stockton v. Johnson, 6 B. Mon. (Ky.) 409; Clark v. Clements, 33 N. H. 563; McKinney v. Slack, 19 N. J. Eq. 164; McLendon v. Hamblin, 34 Ala. 86; Buzzell v. Snell, 25 N. H. 474; Witherell v. Swan, 32 Me. 247; Caulfield v. Sanders, 17 Cal. 569; Yarnell v. Anderson, 14 Mo. 619; O'Brien v. Coulter, 2 Blackf. (Ind.) 421; Higginson v. Mein, 4 Cranch (U. S.), 420; Young v. Price, 2 Munf. (Va.) 534. This presumption has been applied in the case of *bonds*, Tinsley v. Anderson, 3 Call (Va.), 329; Durham v. Greenly, 2 Harr. (Del.) 124; Cottle v. Payne, 3 Day (Conn.), 289; Bartlett v. Bartlett, 9 N. H. 398; Haskell v. Keen, 2 N. & McC. (S. C.) 160; *taxes*, Calebrook v. Stewartson, 28 N. H. 75; Dalton v. Bethlehem, 20 id. 505; Andover v. Merrimac County, 28 id. 137; *judgments*, Kennedy v. Denoon, 3 Brev. (S. C.) 476; Burton v. Cannon, 5 Harr.

itself raise or support a presumption that the debt is paid,[2] although such evidence is admissible as bearing upon the question in connection with other circumstances; and it has been held that evidence showing that the debtor was poor and insolvent when the debt matured, and for a considerable period afterwards, tends to rebut the presumption of payment by the lapse of twenty years.[3] In cases where there is no statutory limitation, in the language of Lord ERSKINE,[4] "mankind, from the infirmity and necessity of their situation, must, for the preservation of their property and rights, have recourse to some general principle to take the place of individual and specific belief," and as a consequence, from the lapse of twenty years from its maturity, without proof of any circumstance to show that its existence was admitted or acknowledged, juries are to presume that a debt has been paid, whether it is evidenced by writing under seal or not; and, while the court itself cannot make such a presumption a new trial will usually be granted if the jury disregards it.[5] This presumption being founded upon public policy, although a presumption of fact merely, is nevertheless regarded as of such force that the facts relied upon for its rebuttal must amount to more than mere belief deduced from the weight of testimony being on that side, and must be of such a character as would revive a debt barred by the Statute of Limitations.[6]

"An admission simply," says WARDLAW, J.,[7] that a debt has not been paid, will not be sufficient *unless it be an admission amounting to an acknowledgment of a subsisting liability like that which would renew a debt barred by the statute;*" and especially would this be the rule in those States where the statute provides that such a presumption shall be raised, and there would

(Del.) 13; *legacies*, Hayes v. Whitall, 13 N. J. Eq. 241; *mortgages*, Sweetser v. Lowell, 33 Me. 446; or any specialty debt, King v. Coulter, 2 Grant's Cas. (Penn.) 77; Shepard's Appeal, 2 id. 402; or debt or liability arising upon any contract, whether sealed or not. Clark v. Clement, 33 N. H. 563.

[2] Alexander v. Dutcher, 7 Hun (N. Y.), 439.

[3] Farmer's Bank v. Leonard, 4 Harr. (Del.) 536.

[4] In Hillary v. Waller, 12 Ves. 267.

[5] SIMPSON, C. J., in Boyce v. Lake, 17 S. C. 481. That the jury and not the court are to presume payment, see McBride v. Moore, Wright (Ohio), 524. Where a note and mortgage were executed in 1858, due in *one* year, and suit was not brought to enforce it until 1880, it was held that very slight evidence would sustain a finding of payment. Pattie v. Wilson, 25 Kan. 326. *Quere*, was *any* evidence beyond the mere lapse of time necessary?

[6] Boyce v. Lake, *ante;* Stover v. Duren, 3 Strobh. (S. C.) 500.

[7] In Stover v. Duren, *ante.*

seem to be no good reason why the common-law presumption should not have the same force. "Presumptions," says HARPER, Ch.,[8] "must be made against the well-known truth of the fact. If twenty years have elapsed without payment of interest, or any *acknowledgment* of a bond, we must presume it paid, *notwithstanding the fullest conviction that it never has been paid.*"[9] The law gives to this presumption an artificial and technical weight beyond that which it would naturally have as a mere circumstance bearing on the question of payment, and the evidence must be of such facts and circumstances as fairly overcome it.[10] Affirmative proof of non-payment and explanation of the creditor's delay may nullify the presumption of payment even after twenty years.[11] If a debt is payable by installments, the presumption attaches to each installment as it becomes due.[12] If when the debt matured, the debtor was under any disability, proof of that fact will rebut the presumption,[13] as if he was absent from the State,[14] or an infant,[15] or from any cause in a situation so that he could not be sued by the creditor.[16] Presumptions of this class do not arise against the government.[17] To rebut the presumption of payment from the lapse of twenty years, it may be shown that the debtor *acknowledged* the indebtedness as existing within that time,[18] or that he was so situated that the claim could not have been enforced against him at law.[19]

[8] In Riddlehoover v. Kinand, 1 Hill (S. C.), Ch. 380.

[9] McQueen v. Fletcher, 4 Rich. (S. C.) Eq. 152; Pryor v. Wood, 31 Penn. St. 142.

[10] Walker v. Wright, 2 Jones (N. C.) L. 155; Herndon v. Bartlett, 7 T. B. Mon. (Ky.) 449; Morris v. Wadsworth, 17 Wend. (N. Y.) 103. A statement made by the surety of a debtor, after the debt had matured, that the creditor had agreed not to push him during his, the surety's, life-time, being proved, was held to rebut the presumption arising from the lapse of time. Fisher v. Phillips, 4 Baxt. (Tenn.) 243.

[11] O'Hara v. Corr, 201 Pa. 341, 59 A. 1099.

[12] State v. Lobb, 3 Harr. (Del.) 421.

[13] Daggett v. Tallman, 8 Conn. 168. The time during which the War of the Rebellion deranged the collection of debts, or during which there was an understanding that payment should not be enforced, will not be reckoned as part of the twenty years. Hale v. Pack, 10 W. Va. 145.

[14] Daggett v. Tallman, *ante*.

[15] Bartlett v. Bartlett, 9 N. H. 398.

[16] Dunlap v. Vail, 2 Cranch (U. S.), 180.

[17] United States v. Williams, 4 McLean (U. S.), 567.

[18] Arline v. Miller, 22 Ga. 320; Nixon v. Bynum, 1 Bailey (S. C.), 148; Livingston v. Livingston, 4 John. Ch. (N. Y.) 294.

[19] Bailey v. Jackson, 16 John. (N. Y.) 210. The presumption of payment may be repelled by various circumstances, as by an admission of the debt within twenty years. McDowell v. McCullough, 17 S. & R. (Penn.) 51; Cattle v. Payne, 3 Day (Conn.), 289; North v. Drayton, 1 Harp. Ch. (S. C.) 34; Goldhawk v.

Instances may arise where payment may be presumed from the lapse of a less period than twenty years, *when there are other facts and circumstances which, taken in connection with such delay in enforcing the claim, fairly support such a presumption*;[20] and in

Durne, 2 Wash. (U. S. C. C.) 323; by the payment of a part of the debt, either principal or interest, Sanders v. Meredith, 3 M. & R. 116; Brearden v. Searcey, 3 Marsh. 544; or a promise to pay within twenty years, Enstace v. Gaskins, 1 Wash. (U. S. C. C.) 188. But the admission must be made in explicit terms, Haskell v. Keen, 2 N. R. McCord (S. C.), 166; or by the debtor himself, or some person having competent authority to bind him. Thus neither an admission or part payment by an heir-at-law, will be operative as against an executor of the estate, Blake v. Quash, 3 McCord (S. C.), 346; Osgood v. Manhattan Co., 3 Cow. (N. Y.) 611; nor will the admission of one joint obligor deprive the others of the benefit of the presumption. Haskell v. Keen, *ante*. The insolvency of the debtor may be shown, or his poverty or inability to pay, Boardman v. De Forest, 5 Conn. 1; Fladlong v. Winter, 19 Ves. 196; Daggett v. Tallman, 8 Conn. 168; Waddell v. Elmendorf, 10 N. Y. 170; but the insolvency of *one* of several joint debtors is not sufficient to repel the presumption. Boardman v. De Forest, *ante*. Or it may be shown that the parties were near relatives, 12 Ves. 266; or that the debtor was permanently absent from the State, Shields v. Pringle, 2 Bibb (Ky.), 387; but merely occasional or temporary absences are not sufficient, Boardman v. De Forest, *ante;* nor is the absence of *one* only of two or more joint debtors, id.; or indeed any facts or circumstances which excuse delay, and show that the debt was not in fact paid, as that the bond was wrongfully obtained by a third person, in an answer, Boltz v. Bullman, 1 Yeates (Penn.), 584; or that the obligee died, leaving the bond with his attorney, who did not deliver it to the personal representatives, it not appearing that they knew of it. Jackson v. Hotchkiss, 6 Cow. (N. Y.) 401. So, that the obligor was the obligee's executor, North v. Drayton, 1 Harp. Ch. (S. C.) 34; or that the obligee's representative had long been engaged in procuring evidence to establish the claim, id. The presumption is liable to be rebutted and overcome by proof of any facts and circumstances, the legitimate tendency of which is to render it more probable than otherwise, in the minds of the jury, that payment has not in fact been made; and the question is one of pure fact for the jury, and any evidence tending to satisfy them that no payment has actually been made, is competent and admissible. Grantham v. Canaan, 38 N. H. 268. Until rebutted or dispelled by evidence, it has all the force and effect of plenary proof, and the jury are not allowed to disregard it. Thompson v. Thompson, 2 Head. (Tenn.) 405. In the case of a payment, which is relied upon to repel the presumption, it cannot now be proved by a mere indorsement made by the payee, at least, unless it was made at such a time anterior to the attaching of the presumption as to make it an admission against his interest, and to repel all suspicions of it having been made merely for the purpose of keeping the debt on foot. Roseboom v. Billings, 17 John. (N. Y.) 184; and an indorsement made by the payee *after* the presumption has no effect as proof. Roseboom v. Billings, *ante*.

[20] Atkinson v. Dance, 9 Yerg. (Tenn.) 424; Tilghman v. Fisher, 9 Watts (Penn.), 411; Fleming v. Emory, 5 Harr. (Del.) 46; Blake v. Quash, 3 McCord (S. C.), 340; Walten v. Harrison, 9 La. An. 234; Milledge v. Gardner, 33 Ga. 397. The character of the plaintiff for promptness in collecting debts due him as well as of the defendant in paying may be given in evidence as a circumstance tending to show that a debt has been paid in a less time than twenty years. Leiper v. Erwin, 5 Yerg. (Tenn.) 97; Brubaker v. Taylor, 76 Penn. St. 83.

all such cases it is for the jury to judge of the weight of the presumption.[21] Thus, it may be shown that the plaintiff was poor, and the debtor of undoubted solvency during the period which has elapsed since the debt matured; and where delay in bringing suit was for a long period, although less than twenty years—as in one case, seventeen years—although such evidence is not *per se* sufficient to raise a presumption of payment, yet, in the absence of any demand or recognition of the debt, or partial payment of principal or interest, *is a persuasive circumstance, and may when slightly corroborated, be sufficient evidence of payment.*[22] *But mere lapse of time* for a period less than twenty years, although it is shown that the debtor was, during all such time, solvent and able to pay, does not warrant the presumption.[23] This artificial presumption of payment no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief, than the bar under the Statute of Limitations permits a nearer approach to the statutory period to avail.[24]

[21] Waters v. Waters, 1 Met. (Ky.) 519.

[22] Briggs' Appeal, 93 Penn. St. 485; Moore v. Pague, 1 Den. (Ky.) 327; Blackburn v. Squab, Peck (Tenn.), 60. In Bender v. Snyder, 5 Barb. (N. Y.) 63, the lapse of fourteen years after the last installment upon a bond or mortgage became due, taken in connection with other circumstances, was held sufficient to raise the presumption that the bond and mortgage was paid. In McDaniel v. Goodall, 2 Caldw. (Tenn.) 391, the lapse of sixteen years after a decree or judgment had been obtained, *with no demand or payment of principal or interest, and no attempt to enforce collection,* was held sufficient to raise a presumption of payment; and in Thompson v. Thompson, 2 Head. (Tenn.) 405, the same rule was applied to a bond. Lapse of time is a circumstance which, taken in connection with others, may warrant an inference that a debt has been paid, even after less than twenty years, and its value as a circumstance is in proportion to the length of time which has elapsed since the debt became due. Walker v. Emerson, 20 Tex. 706. See Gould v. White, 26 N. H. 178; Baker v. Stonebroker, 36 Mo. 338, for instances in which specialty debts were presumed to have been paid by a lapse of time less than twenty years in connection with other circumstances.

[23] Daly v. Erricsson, 45 N. H. 786; Thomas v. Hunnicott, 54 Ga. 337. In order to repel a presumption of payment arising from the lapse of time because of the insolvency of the debtor, such a state of insolvency on his part must be shown *during the whole period as proves that he did not pay because he could not.* Grant v. Burgwyn, 84 N. C. 560.

[24] Smithpeter v. Ison, 4 Rich. (S. C.) 203. Lapse of time, *although only one day less than twenty years,* will not of itself warrant a presumption of payment, but when coupled with other circumstances the jury may find the fact of payment therefrom, although a plea setting up the presumptive payment has not been filed. Sadler v. Kennedy, 11 W. Va. 187; Caldwell v. Prindle, 11 id. 397. Payment of a judgment may be presumed from the lapse of less than twenty years when there are persuasive circumstances which can be submitted to the jury in connection with it. Moore v. Smith, 81 Penn. St. 182; Garnier v. Renner, 51 Ind. 372.

And in those cases where a shorter period has been permitted to support such a presumption, it will be found that such lapse of time was aided by other circumstances,[25] or the statute, as is the case in some of the States, provides a shorter period. *The possession of the evidence of a debt by the payer, after maturity, affords prima facie evidence of its payment by him,* as of a bill of exchange by the drawee,[26] of a bond by the obligor,[27] of a note in the hands of the maker.[28] But the presumption arising from this circumstance may be rebutted, by showing that such evidences of debt were placed in the hands of the debtor for a special purpose, or that he came into their possession by mistake or without the consent of the payee.[29] The payment of a *subsequent* debt always raises the presumption that prior debts have been paid.[30] Thus, in the case last cited, where *three* notes were secured by a mortgage, and the two last due were shown to have been sued and recovered, it was held that in the absence of opposing proof, after the lapse of thirty years, the presumption was irresistable.

So, where a broker rendered his accounts to his principal, and no motion was made therein for a claim of which the principal was liable, as joint debtor, it was held that the presumption was that such claim had been paid, and that this presumption must be overcome before the broker could recover thereon.[31]

A strong illustration of this rule is found in the case of actions for rent, by a landlord against his tenant. In such cases a receipt

[25] Pitkin v. Kent, 1 Root (Conn.), 312; Winstanley v. Savage, 2 McCord (S. C.) Ch. 435; Diamond v. Tobias, 12 Penn. St. 312; Bailey v. Gould, Walker (Mich.), 478; Wightman v. Butler, 2 Spears (S. C.), 357;

[26] Hill v. Gayle, 1 Ala. 275; Close v. Field, 2 Tex. 232.

[27] Day v. Clarke, 1 A. K. Mar. (Ky.) 521.

[28] Alvord v. Baker, 9 Wend. (N. Y.) 323; Weidner v. Schweigart, 9 S. & R. (Penn.) 385; Garlock v. Geortun, 7 Wend. (N. Y.) 198; Egg v. Barnet, 3 E. & P. 196.

[29] Banks v. Marshal, 23 Cal. 223. Checks drawn by the president of a corporation upon the treasurer in favor of contractor, and found in the possession of the treasurer, or in the archives of the corporation, are *prima facie* evidence that they have been paid, the work under the contract having been done; and the same rule applies to all cases of evidences of debt. Union Canal Co. v. Lloyd, 4 W. & S. (Penn.) 393. The possession of acceptances by the persons making them raises a presumption that they are paid. Hays v. Samuels, 55 Tex. 560.

[30] Matthews v. Light, 40 Me. 394.

[31] Smith v. Tucker, 2 E. D. S. (N. Y. C. P.) 193. See, also, Bushee v. Allen, 31 Vt. 631, where the fact that an item of book account was not alluded to or considered at the time of a settlement of accounts between the parties, and no excuse for not having alluded to such item was given upon the trial of an action to recover such item, was held to constitute strong evidence against the justice of the claim, but not to amount to an actual bar to its recovery.

for the payment of the rent last accruing raises a presumption that all previous rent has been paid.[32] So, where an employer has been in the habit of paying his employees regularly every week or month, the receipt of the wages accruing for the last week or month affords presumptive evidence that his previous wages have been paid,[33] and the same has been held where a servant had left his employer's service for a considerable time before a claim for a balance of wages has been made.[34] So, where an agent is shown to have been in the habit of accounting to his principal at regular stated periods for money received by him for his principal, it will be presumed that he has so accounted, and the onus of proving the contrary is upon the principal;[35] and in the case of factors and commission merchants it will, after reasonable time—though less than twenty years—be presumed that they have accounted for the proceeds of goods consigned to them for sale.[36] The return of an execution as satisfied raises a presumption that the money was received by the plaintiff.[37] In all cases where previous year's taxes remaining unpaid are required to be carried forward to the next year, the failure to carry forward the tax of a previous year raises a presumption that such previous year's tax is paid.[38] Where an attachment of property is made upon *mesne* process and the record fails to show that this was followed by a levy of the execution, a presumption is thereby raised that the debt was paid.[39] From the circumstance that a promissory note is given by one person to another, it will be presumed that the payee was not at that time indebted to the maker,[40] and that all claims in favor of the maker against the payee were adjusted at that time;[41] but this presumption is only *prima facie* in its effect, and may be rebutted by showing that the payee was in fact indebted to the maker, or that the

[32] Patterson v. O'Hara, 2 E. D. S. (N. Y. C. P.) 58; Gilbert on Ev. 157; Bremer v. Knapp, 1 Pick. (Mass.) 337. Payment of rent reserved in a perpetual lease, or conveyance in form, may be presumed after the lapse of twenty years, but the non-payment for more than that period does not raise a presumption that the covenant to pay rent has been released and discharged. Lyon v. Odell, 65 N. Y. 28.

[33] Lucas v. Novosilieski, 1 Esp. 296.

[34] Seller v. Norman, 4 C. & P. 80.

[35] Evans v. Birch, 3 Camp. 10.

[36] Lapham v. Braddick, 1 Taunt. 572.

[37] Boyd v. Foot, 5 Bos. (N. Y.) 110.

[38] Attleboro v. Middleboro, 10 Pick. (Mass.) 378.

[39] Benson v. Benson, 24 Miss. 625. For the species of proof requisite to establish a payment, as well as what constitutes a payment, see chap. , "Payment."

[40] Gould v. Chase, 16 John. (N. Y.) 226; De Freest v. Bloomingdale, 5 Den. (N. Y.) 304.

[41] Lake v. Tysen, 6 N. Y. 461.

note was given for an independent transaction, not affecting existing debts between the parties.[42] There is no presumption that goods sold are paid for on delivery, nor can such a presumption be raised from the circumstance that the sellers sent to the buyer an unreceipted bill, upon which was written or printed the words, "Terms cash."[43]

Sec. 70. Title to Property presumed from Possession.

As has already been stated, the presumption is, that the title to property is in the person in whose possession it is found,[1] unless there are circumstances connected with such possession as overcome this presumption, and should put third persons upon inquiry,[2] and this is the rule both as to real or personal property. In the case of lands, as between the person in possession and a third person having no valid title thereto, such possession prevails as evidence of title, until a better title is established in the other; but when a better title is established, the party in possession must prove his title.[3] The rule relative to lands may be said to be that where the rights of two hostile parties stand upon mere possession not yet ripened into a perfect title, he who has the prior possession has

[42] Duguid v. Ogilvie. 3 E. D. S. (N. Y. C. P.) 527. As to the presumption of payment of mortgages, legacies, etc., see those heads.

[43] Wellaner v. Fellows, 48 Wis. 105.

[1] Drummond v. Hopper, 4 Harr. (Del.) 327; Finch v. Alston. 2 S. & P. (Ala.) 83; Entriken v. Brown, 32 Penn. St. 364; Vining v. Baker, 53 Me. 544; Sparks v. Rawls, 17 Ala. 211; Goodwin v. Garr, 8 Cal. 615; Fish v. Skut, 21 Barb. (N. Y.) 333; Millay v. Butts, 35 Me. 139. Property found in the possession of a deceased person is presumed to belong to the estate until the contrary is proved. Succession of Alexander, 18 La. An. 337. Where goods are taken upon execution while in the actual possession of the defendant in the execution, and are replevied by a person claiming to be the owner thereof, the burden of proving that they are his property rests upon the plaintiff; but if the goods were in the possession of another, at the time of the levy, the burden is cast upon the officer making the levy of proving property in the defendant in the execution. Merritt v. Lyon. 3 Barb. (N. Y.) 110. So where property has been sold on execution, evidence that the defendant, at the time of the levy, and for eighteen months before, had the property in his possession, hired it out and otherwise enjoyed the use of it, and that a claimant was present at the sale, making no objection, is *prima facie* evidence of property in the defendant in execution. Bordine v. Combs, 15 N. J. L. (3 Green), 412. In an action by a party holding sheep as estrays, for their alleged conversion, the burden is on the defendant to show that by ownership or otherwise he was entitled to take the sheep. Hendricks v. Decker, 35 Barb. (N. Y.) 298.

[2] Austin v. Bailey, 37 Vt. 219; Calvin v. Warford, 20 Md. 357.

[3] Wendell v. Blanchard, 2 N. H. 456; Rachell v. Holmes, 2 Bay (S. C.), 487.

the best right, with the qualification that, if the party having the prior possession abandons and surrenders it to the adverse party, he cannot afterward set it up.[4] And, in favor of long possession, almost every variety of written evidence will be presumed, and the defective links in the chain of title will be supplied by presumption, and the title declared perfect, when the possession has continued for a great length of time.[5] It is well settled that prior actual possession of chattels, *without title,* is good as against a trespasser who has no better right;[6] and in an action either of trover or trespass for chattels, it is sufficient if the plaintiff, as against the defendant, has the better right to the possession of the property, although he has no actual title thereto,[7] as in this class of actions the right to recover depends upon the *right to the possession at the time of the conversion.*

But where property, real or personal, is found in the possession of several persons, the law refers the possession to him who has the ownership.[8]

In the case of personal property the presumption of title arising from possession may be rebutted by showing that it was held as bailee, or in a subordinate capacity,[9] as, that it is held as a servant or agent for the real owner. Thus it was held that the presumption of title raised by possession of a regular warehouse receipt, the plaintiffs alleging that they derived title from the defendants, is not rebutted by proof that the defendants once owned it, and that the person to whom, in his own name, the receipt was given, was the defendant's agent.[10]

Where property is sold and there is no evidence as to whether

[4] Austin v. Bailey, 37 Vt. 219; Clifton v. Lilly, 12 Tex. 130.

[5] Nixon v. Carco, 28 Miss. 414.

[6] Knapp v. Winchester, 11 Vt. 351; Cook v. Patterson, 35 Ala. 102; Coffin v. Anderson, 4 Blackf. (Ind.) 395; Carter v. Bennett, 4 Fla. 283.

[7] Jones v. Sinclair, 2 N. H. 319; Burton v. Taunchill, 6 Blackf. (Ind.) 470; Fairbanks v. Phelps, 22 Pick. (Mass.) 535; Grady v. Newby, 6 Blackf. (Ind.) 442.

[8] Lenoir v. Rainey, 15 Ala. 667; Maples v. Maples, Rice (S. C.), Ch. 300; Miller v. Fraley, 23 Ark. 735; Ganenor v. Compbell, 17 Ala. 566.

[9] Linscott v. Trask, 35 Me. 139.

[10] Horr v. Barker, 8 Cal. 609. In replevin for certain hogs, taken by the defendant, as deputy sheriff, on an execution against A., the court charged the jury that, if A. was found in the possession of the hogs, he would be presumed to be the owner; but that this presumption would yield to proof, and that any proof would be sufficient if it produced belief in the minds of the jury that the title was in another. Held, that this charge was correct. Park v. Harrison, 8 Humph. (Tenn.) 412.

the vendor had the possession of it at the time of sale, it will be presumed that he had such possession.[11]

Where goods are sold without any special contract as to credit, although the vendor is not obliged to deliver them until they are paid for, yet from the mere circumstance of delivery it will not be presumed that they were paid for, nor will the circumstance that an unreceipted bill was sent to the vendee by the vendor, upon which was written or printed the words, " Terms cash," raise such a presumption.[12]

Sec. 71. Miscellaneous Presumptions.

Presumptions may arise from artificial habits; as the course of trade; the course of the post; the customs of a particular trade, or of a particular class of people. In this way, the time of credit, the time when a letter was received, etc., etc., may be proved, and stand so until rebutted.[1] Proof that a letter was properly addressed and mailed raises a presumption that the addressee received it, although the presumption may be rebutted.[2] In the same way, on proof that a telegram is sent asking for an answer, the receipt of a telegram purporting to be a reply is evidence of a reply without direct evidence that the supposed sender authorized it. The principle is that the presumption obtaining that the postal authorities do their duty accurately should be extended to telegraph companies.[3] The reliance on the course of the post is most conspicuous in suits to charge drawers and indorsers of commercial paper.[4] The course and custom of trades and classes run through every department of society, giving a construction to their words and conduct, and charging them with notice and knowledge. Where a bank discounts a note on certain parties, as banks do not usually buy paper of insolvents, in the absence of proof it must be presumed that the bank did business as such business is usually

[11] Lang v. Hickingbottom, 28 Miss. 772.

[12] Willaner v. Fellows, 48 Wis. 105.

[1] Stark Ev. 356. And see 2 Ev. Poth. 334, No. 16, § 14.

[2] Dick v. Zimmerman, 207 Ill. 636, 69 N. E. R. 754; Merchants Exchange Co. v. Sanders (Ark., 1905), 84 S. W. 786; Planters Mutual Insurance Ass'n v. Green, 72 Ark. 305, 80 S. W. 151.

[3] People v. Hammond, 132 Mich. 422, 93 N. W. 1084; Western Twine Co. v. Wright, 11 S. D. 521, 78 N. W. 942; Eppinger v. Scott, 112 Cal. 369, 42 P. 301, 53 Am. St. Rep. 220, 44 P. 723; Perry v. German American Bank, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593.

[4] De Forest v. Hunt, 8 Conn. 179.

done, and that the parties whose notes were discounted were solvent.[5] It has been held that the officers of an insurance company should be presumed to be cognizant of the marine intelligence contained in a newspaper taken at the office, especially that which relates to their own port.[6] So, that a client, resident abroad, has left all material papers with his attorney, who defends his cause in England; but not if he resides in England; and in no case, if the paper is not obviously material.[7] So, that all the partners may have access to and know the contents of partnership books, though this may be repelled by circumstances.[8] So, that a bank stockholder is entitled to a certificate of ownership, as it is the habit of nearly all banks to give this.[9] Presumptions also arise from the state of society. In a slaveholding State, formerly, a person bearing a black complexion was presumed to be a slave; though otherwise of a yellow or mulatto.[10] While in New York, where slavery yet barely lingered, and a majority of blacks were free, the same presumption was denied, even from a plain African color and features.[11] The wife, in the husband's absence, is presumed to have been left an agent for the hiring out of his horses.[12] A servant by the year having left her service a considerable time, the presumption, in England, is that her wages were paid.[13] *A fortiori* when the service is in a factory, where the custom is to pay weekly.[14]

The latter case comes rather to the practice of individuals, concerning which there are various cases. Only some few of the modern ones will be given. A man allowing his friend repeatedly to forge his name upon commercial paper, by submitting to have the paper enforced, is held incapable of defending against subsequent forgeries.[15] The habit of the retailer to charge interest after ninety days is held to bind the customer, who shall be presumed to

[5] German Security Bank v. Columbia Finance and Trust Co. (Ky., 1905), 85 S. W. 761.

[6] Green v. Merch. Ins. Co. of New Bedford, 10 Pick. (Mass.) 402.

[7] Vice v. Anson, 3 C. & P. 19.

[8] United States Bank v. Binney, 5 Mas. (U. S.) 176.

[9] Hussey v. Man. & Mech. Bank of Nantucket, 10 Pick. (Mass.) 415.

[10] Scott v. Williams, 1 Dev. (N. C.) 336.

[11] Rogers v. Berry, Wash. Circ. June, 1812, *Cor.* YATES, J., MS.; S. C., but not S. P., 10 John. (N. Y.) 132.

[12] Church v. Landers, 10 Wend. (N. Y.) 79, 80.

[13] Sellen v. Norman, 4 C. & P. 80.

[14] Note *a* to Sellen v. Norman, *supra*.

[15] Weed v. Carpenter, 4 Wend. (N. Y.) 219.

know the habit.[16] So, the practice of a porter to a bank as to the time of presenting checks.[17] The practice of clerks in a counting-house as to mailing letters.[18] And the habit of an attorney's office, as to the preparation and service of notices to quit.[19]

From the custom of parents to furnish their daughters, on marriage, with outfits, the delivery of property by a parent to a daughter, on the occasion of her marriage, without explanation, will be presumed to be a gift.[20] So, if some time after marriage.[21]

So things are held to be legally and properly in their existing state, until the contrary is shown; as if a person is in possession of property, the presumption is that he is the rightful owner.[22]

Litigants owe the duty of assisting in every legitimate way in the elucidation of the truth. When a defendant can by his own testimony throw light upon matters at issue, necessary to his defense and peculiarly within his own knowledge if the facts exist, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the facts do not exist. Where one of the parties to a suit has more means of knowledge concerning a matter to be proved than the other the onus is on him. So, where the defendant in a suit to recover money is charged with overdrawing his account and he does not go upon the stand to rebut the proof offered by the bank it will be presumed that he has no explanation to offer.[23] Where, in an action for personal injuries by one run over by an electric car, the defendant company fails to

[16] M'Allister v. Reab, 4 Wend. (N. Y.) 483, 490.

[17] Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 443.

[18] Toosey v. Williams, 1 M. & M. 129.

[19] Patteshall v. Turford, 3 B. & Ad. 890.

[20] Smith v. Montgomery, 5 Mon. (Ky.) 502; Bell v. Strother, 3 McCord (S. C.), 207, 210; Johnson v. Dilliard, 1 Bay (S. C.), 232; Teague v. Griffin, 2 Nott & McCord (S. C.), 93; De Graffenried v. Mitchell, 3 McCord (S. C.), 506; Byrd v. Ward, 4 McCord (S. C.), 228.

[21] M'Cluney v. Lockhart, 4 McCord (S. C.), 251. See 1 Dom. b, 13, tit. 6, § 4, art. 7, that persons shall be presumed to act according to their principles and customs.

[22] 2 Ev. Poth. 333, No. 16, § 14; 1 Dom. b. 3, tit. 6, § 4, art. 1; Livingston v. The Peru Iron Co., 9 Wend. (N. Y.) 520, 521; Bell v. Com., 1 J. J. Marsh. (Ky.) 550; Fowke v. Darnell, 5 Litt. (Ky.) 319; Cook v. Wilson, Litt. Sel. Cas. (N. Y.) 439; Schermerhorn v. Van Volkenburgh, 11 John. (N. Y.) 529; Jackson *ex dem.* Glover v. Winslow, 9 Cow. (N. Y.) 13; Jackson *ex dem.* Klock v. Rightmyre, 10 John. (N. Y.) 314; Smith v. Lorillard, 10 John. (N. Y.) 338; Ricard v. Williams, 7 Wheat. (U. S.) 59; Jackson *ex dem.* Williams v. Miller, 6 Cow. (N. Y.) 751; Campbell v. Roberts, 3 Marsh. (Ky.) 623; Riley v. Million, 4 J. J. Marsh. (Ky.) 395.

[23] Bastrop State Bank v. Levy, 106 La. 586, 31 So. 164.

call the motorman of the car, this raises a presumption that his testimony if introduced would have been unfavorable.[24]

So the law presumes that a fact continuous in its character, still continues to exist, until a change is shown; as a partnership;[25] or, within certain limits, that a life continues.[26] So that a legal or actual possession continues.[27] That a corporation continues to exist.[28] That an entry and ouster by a landlord upon his tenants continues, till a restoration is shown.[29]

Yet a written admission that the defendant was editor on one day, was held at *nisi prius* no evidence that he was editor on a subsequent day.[30] And admitting insolvency at one time was denied as evidence that it existed a considerable time after.[31]

Bad character is presumed to continue; and a gambler to continue a gambler.[32]

So, everything which happens naturally and commonly is taken as true; as that a father loves his children.[33] So of fraternal affection, for where a younger brother entered on the land which descended to the elder brother, in his absence, this was held not to be adverse, because of the relation between them.[34] So of things happening naturally; a collateral relation claiming by descent from a decedent advanced in life, must prove that he died *without issue,* which will not be presumed.[35] And on the other hand, so amply have medical science and general observation borne testimony to the obstinacy of a settled or habitual derangement of the intellect, that *semel furandibus semper furandibus, praesumitur.*[36]

Innocence, as being the more natural and usual state, is always

[24] Fonda v. St. Paul City Ry. Co., 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 166.

[25] 1 Stark. Ev. 36.

[26] Innes v. Campbell, 1 Rawle (Penn.), 373. And see 2 Ev. Poth. 333, No. 16, § 14.

[27] Bayard's Lessee v. Colefax, 4 Wash. (U. S. C. C.) 38.

[28] People v. Manhattan Co., 9 Wend. (N. Y.) 351.

[29] Lewis v. Paine, 4 Wend. (N. Y.) 423, 429. And see Miller v. Porter, 4 Wend. (N. Y.) 672.

[30] Macleod v. Wakely, 3 C. & P. 311.

[31] Hume v. Long, 6 Mon. (Ky.) 116.

[32] McMahon v. Harrison, 6 N. Y. 443.

[33] 1 Dom. b. 3, tit. 6, § 4, art. 7.

[34] Gilb. Ten. 28; Magow's Case, Latch. 68.

[35] Dudley v. Grayson, 6 Mon. (Ky.) 259.

[36] Stevens v. Van Cleve, 4 Wash. (U. S. C. C.) 262; Van Dusen v. Van Dusen, 5 John. (N. Y.) 144; Caldwell v. King, 4 Cow. (N. Y.) 207; Attorney-General v. Paruther, 3 Bro. (U. S. C. C.) 441, 443; White v. Wilson, 13 Ves. 87, 88; Hoge v. Fisher, 1 Pet. (U. S. C. C.) 163; Vance v. Com., 2 Va. Cas. 132; Lee v. Lee, 4 M'Cord (S. C.), 189; Kinloch v. Palmer, 1 Rep. Const. Ct. (S. C.) 225.

presumed, until rebutted.[37] And so that a wife accompanying her husband in the commission of crime, acts under his coercion, and consequently without a guilty intent.[38] But this presumption may be rebutted by evidence that the wife was an active and willing participator in the crime and so jointly liable.[39] So a minor is presumed to be under the control and protection of the parent, even though such minor is out at hired service.[40]

So every one is presumed to take care of his own concerns.[41] Hence the owner and vendor will be presumed to know of obvious defects in the things sold; *e. g.,* the adverse possession of his land by another.[42] It is also a presumption that he who pays is indebted.[43] Thus a person accepting and paying a check has, *prima facie,* funds of the drawer to that amount.[44] A gift is not to be presumed. Thus, though payment may be presumed after twenty years, yet that being repelled, the law will not presume the debt forgiven.[45] The law presumes that a prebendary *de facto* had performed the requisites to make him so.[46]

Another fruitful subdivision of presumption from what is natural and usual, sanctioned both in the civil and common law, is the rule that every one governs himself by the rules of right reason, and consequently acquits himself of his engagements and his duty.[47] This rule extends to every man, both in his official and private character.[48]

But although it is said that fraud, etc., are not to be presumed, the student should be careful to remember that this is predicable of those acts only which stand alone. Not that fraud, like crime, may not be made out and presumed from circumstantial testimony.[49] True, this ought not to be slight.[50] Yet strong presumptive cir-

[37] 2 Ev. Poth. No. 16, § 14.
[38] Rex v. Knight, 4 C. & P. 116.
[39] Comm. v. Adams, 186 Mass. 101, 71 N. E. 78.
[40] Millar v. Thompson, 1 Wend. (N. Y.) 447.
[41] 1 Dom. b. 3, tit. 6, § 4, art. 7.
[42] Lane v. Shears, 1 Wend. (N. Y.) 433.
[43] 1 Dom. b. 3, tit. 6. § 4, art. 7, 10; James v. Biou, 2 Sim. & Stu. 606.
[44] State Bank of North Carolina v. Clark, 1 Hawks (N. C.), 36.
[45] Potter v. Titcomb, 7 Me. 302.
[46] Dr. Sherard's Case, cited 2 Bl. 853.
[47] 1 Dom. b. 3, tit. 6, § 4, art. 7.
[48] Bank of the U. S. v. Dandridge, 12 Wheat. (U. S.) 69, 70. And see Ballou v. Campbell, 5 Wend. (N. Y.) 572; Colvin v. Carter, 4 Ham. (Ohio) 354; Fridge v. The State, 3 G. & J. (Md.) 103; Whittlesey v. Starr, 8 Conn. 134; Truwhit v. Dupree, 2 C. & P. 557.
[49] *Per* Lord HARDWICKE, in Aston v. Aston, 1 Ves. 268; Watkins v. Stockett. 6 H. & J. (Md.) 435; Brogden v. Walker, 2 id. 292.
[50] Caldwell v. Benedict, 8 Mart. (La.) 454.

cumstances indicating fraud, will outweigh positive proof against it.[51] Indeed, so common and obvious are these circumstances in some cases, as where property is transferred in fraud of creditors, that the professional reader can find ample illustration in his own recollection. The Court of Chancery constantly presumes fraud from certain confidential relations, as that of trustee and *cestui que trust,* principal and agent, etc., existing between the parties in respect to the subject-matter of the contract;[52] a principle which constitutes an important distinction between the jurisdiction of chancery and the courts of common law.[53]

A voluntary conveyance by a debtor to a trustee for the benefit of his wife, is deemed fraudulent and void, as against existing creditors;[54] to render a deed voluntary, it must be without any the least valuable consideration; if given for any the least valuable consideration, the question whether it is fraudulent as to creditors is one of fact for a jury.[55] Even a voluntary conveyance from a parent to his child by way of advancement, though presumed fraudulent as against existing creditors, may be upheld where the presumption is repelled by circumstances or by positive evidence.[56] The intent to defraud need not be shown by direct evidence. A conveyance by the father to his son of all his property, in part consideration of an unliquidated indebtedness to him for several years' labor, and in part to provide for his own and his wife's future support, the son to pay all his debts except a contingent liability by indorsement, the whole consideration being much less than the value of the property conveyed, is fraudulent and void, as against creditors.[57] A sale to an infant partly on credit, made by a firm in embarrassed circumstances, is not necessarily fraudulent and void as against creditors.[58] To avoid a voluntary conveyance, as against creditors, it is not necessary that the debtor should be insolvent, or believe himself to be so, at the time of the grant; it is sufficient if his solvency depends upon his success in business, in a pending speculation.[59] When the con-

[51] The Short Staple, 1 Gal. (U. S.) 104.
[52] Gallatian v. Cunningham, 8 Cow. (N. Y.) 361.
[53] Caldwell v. King, 4 Cow. (N. Y.) 207.
[54] Read v. Livingston, 3 Johns. Ch. (N. Y.) 481.
[55] Jackson v. Seward, 5 Cow. (N. Y.) 67.
[56] Van Wyck v. Seward, 18 Wend. (N. Y.) 375.
[57] Robinson v. Stewart, 10 N. Y. 189.
[58] Matthews v. Rice, 31 N. Y. 457.
[59] Carpenter v. Roe, 10 N. Y. 227.

veyance is made by a man in prosperous circumstances, and the gift is only a reasonable provision for his wife or children, which leaves him fully able to discharge all his debts, the presumptive evidence of fraud is met and repelled.[60] The fraud which must be alleged and proved, may be established by facts and circumstances;[61] if not inferable from the circumstances, the conveyance will not be invalidated by a subsequent inability to pay an existing debt.[62]

In an action for damages for inducing the plaintiffs to sell and deliver goods by false and fraudulent representations, it seems that the plaintiff will not be allowed to testify in answer to a question by his own counsel, that he sold and delivered the goods relying on the truth of the defendant's representations;[63] his intention and motives are in issue and so are the representations themselves; his acts must declare his intent, as in the case of a voter depositing a written ballot.[64]

So a conspiracy may be proved by circumstances, among which are the acts of the parties in doing the injury which is the alleged object of the conspiracy.[65]

Again: men are presumed to act according to their own interest.[66] A tenant in tail pays off an incumbrance on the estate. Why? In order to exonerate it; for he can at any time obtain the fee simple in another form, and therefore has no interest in keeping it on foot to protect the estate, or enlarge it, or to reimburse himself. Otherwise of a tenant for life, who has but a temporary interest. He cannot save himself without the incumbrancer's place, which chancery will give to him, with all the incumbrancer's rights and remedies, upon the presumption that the tenant intended the apparent payment as an act of purchase. And so of the like cases.[67]

[60] Babcock v. Eckler, 24 N. Y. 623; Hinds' Lessees v. Longworth, 11 Wheat. (U. S.) 199.

[61] Newman v. Cordell, 24 N. Y. 623; Waterbury v. Sturtevant, 18 Wend. (N. Y.) 353.

[62] Newman v. Cordell, 24 N. Y. 623.

[63] Shaw v. Stine, 8 Bosw. (N. Y.) 157.

[64] People v. Saxton, 22 N. Y. 309.

[65] Jones v. Becker, 7 Cow. (N. Y.) 445.

[66] Finch's Law, 37.

[67] *Per* Lord THURLOW, C., in Countess of Shrewsbury v. Earl of Shrewsbury, 1 Ves. Jr. 227, 233; Kirkham v. Smith, 1 Ves. 258; Amesbury v. Brown, 1 Ves. 477; Jones v. Morgan, 1 Bro. C. C. 206, 218; Ware v. Polhill, 11 Ves. 257; St. Paul v. Lord Dudley, 15 Ves. 167; Redington v. Redington, 1 B. & B. 131, 141; Earl of Buckinghamshire v. Hobart, 3 Swanst. 186.

This presumption, like any other, may in various ways be repelled.[68]

Other presumptions arise from the nature and general incidents of property. To the ownership of lands, certain rights and privileges are annexed *de communi jure;* though not so inseparable but that they may be disannexed, and vested in another. Thus the

[68] *Per* Lord ELDON, C., in St. Paul v. Viscount Dudley, 15 Ves. 173; Jones v. Morgan, 1 Bro. C. C. 206; Lady Shrewsbury v. Lord Shrewsbury, 3 Bro. C. C. 126; Redington v. Redington, 1 B. & B. 143; Windham v. Lord Egremont, Ambl. 753; Kirkham v. Smith, 1 Ves. 258; Amesbury v. Brown, 1 Ves. 480; Earl of Buckinghamshire v. Hobart, 3 Swanst. 186; Forbes v. Moffat, 18 Ves. 384. And see Gardner v. Astor, 3 John. Ch. (N. Y.) 53, 55.

The modern cases have arisen mainly upon mortgage transactions. Thus, where the equity of redemption was devised to the mortgagee, it was held that this union of estates should extinguish the mortgage, if that result would be indifferent to the devisee; otherwise if he had an interest to keep it on foot; and so of other similar cases. Forbes v. Moffat, 18 Ves. 384; Gibson v. Crehore, 5 Pick. (Mass.) 146; Freeman v. Paul, 3 Me. 260; Starr v. Ellis, 6 John. Ch. (N. Y.) 393; Mills v. Comstock, 5 id. 214; Lockwood v. Sturdevant, 6 Conn. 372. *Prima facia*, it is an extinguishment; and the one who pays must show that his interest was to have the mortgage kept on foot. Gardner v. Astor, 3 John. Ch. (N. Y.) 53; Burnet v. Deniston, 5 id. 35; Starr v. Ellis, 6 id. 393. Thus, where one owning the equity of redemption in fee, paid off a mortgage in which the mortgagor's wife joined, and which payment, if allowed to operate as an extinguishment, would let in her dower against the owner, discharged from the mortgage, the latter will be taken as still subsisting. Gibson v. Chehore, 3 Pick. (Mass.) 475. And this would be so, although the owner not only pays, but takes a release from the mortgagee. Caril v. Butman, 7 Me. 102; Thompson v. Chandler, id. 377. So where the mortgagee took a deed with a warranty from the mortgagor, the former was still allowed the benefit of his mortgage, as against a previous attaching creditor of the mortgagor. Myers v. Brownell, D. Chip. (Vt.) 488. So of the convenants of title, in the mortgage. Lockwood v. Sturdevant, 6 Conn. 373. And though he takes a release of the equity of redemption on his prior mortgage, and discharges the debt, this will not let in a subsequent mortgage. Baldwin v. Norton, 2 Conn. 161. But in such a case, the proof of an interest or intent at the time to keep the mortgage on foot, should be clear and precise. Burnet v. Denniston, 5 John. Ch. (N. Y.) 35. Where the intention is declared by the deed to consider the mortgage paid, this will be conclusive. Wade v. Howard, 6 Pick. (Mass.) 492. Whether considerations of interest prevail or not, all the cases agree that the intent may be declared at the time, or deduced from various circumstances. James v. Johnson, 6 John. Ch. (N. Y.) 417.

Upon the same principle, long acquiescence by one in the adverse enjoyment of a right by another, leads to an inference that the former has parted with it in a legal form; and, in time, may lead to the presumption of the necessary instruments of assurance, or of the requisites to make existing assurances valid against him. So of the extinction and satisfaction of demands, and the sanctioning of secondary evidence. Fitzhugh v. Croghan, 2 J. J. Mar. (Ky.) 435 to 437, and Bigger v. Alderson, 1 Munf. (Va.) 54.

Upon the same principle, it is presumed that a man has adopted or accepted an advantageous act, offer, gift, bequest, devise or conveyance, etc., until his positive disclaimer or refusal is shown. *Per* BAYLEY and LITTLEDALE, J's, in Bailey v. Culverwell, 8 B. & C. 448; Marston v. But-

lord of the manor owns the soil of common right; and on his being proved lord of the manor, his ownership of the soil is intended; and it lies with the opposite side to show that any part belongs to another.[69] So the different landholders of a manor have *prima facie* a right of common on the lord's waste; and the owner of the surface of the land, to the minerals or inferior strata; the possessor of a several fishery to the ground covered with water;[70] and so of various other incidental rights, as the lord to the soil of the highway running over the waste of his manor;[71] and the owner of inclosed land, to the waste intervening between that and the highway.[72] So where a road passes between the land of A. and B., *prima facie*, each owns the soil thereof, *usque ad filem viae*.[73] So

ler, 3 Wend. (N. Y.) 149; Camp v. Camp, 5 Conn. 291; Townsend v. Tickell, 3 B. & Ald. 31, and the cases there cited, particularly Thompson v. Leach, 2 Salk. 618. See also Nicholson v. Wordsworth, 2 Swanst. 365, 372; Adams v. Taunton, 5 Madd. 435; and 2 Prest. on Abstracts, 226 *et seq.* This rule is mainly applied to the presumed acceptance by creditors of their debtor's assignment, in trust for their payment, where the assignment requires no release or other disadvantageous terms. Nicholl v. Mumford, 4 John. Ch. (N. Y.) 522, 529; Halsey v. Fairbanks, 4 Mas. (U. S.) 206. And see Brooks v. Marbury, 11 Wheat. (U. S.) 78; and M'Allister v. Marshall, 6 Binn. (Penn.) 338. Or to the assent of the assignees or trustees. Wilt v. Franklin, 1 Binn. (Penn.) 502. And see Lippincott v. Barker, 2 Binn. (Penn.) 174; Shepherd v. M'Evers, 4 John. Ch. Rep. 136; Nelson v. Blight, 1 John. Cas. 205; Weston v. Barker, 12 John. (N. Y.) 276; and Cumberland v. Codrington, 3 John. Ch. (N. Y.) 229, 261. But the doctrine of presumed assent in these particular cases is received, if at all, with great caution in Massachusetts, where, to warrant it, the benefit must appear to be decided and unequivocal. Russell v. Woodward, 10 Pick. (Mass.) 408. The Supreme Court of that State, however, applied the principle very strongly in another case, where they presumed the assent of a widow to a testamentary provision in lieu of dower, it appearing decidedly advantageous. Merril v. Emery, 10 Pick. (Mass.) 507. In England, it is held that one shall be presumed to have adopted an advantageous act done by another as his assumed agent. *Per* BAYLEY and LITTLEDALE, JJ's, in Bailey v. Culverwell, 8 B. & C. 448. In Beal v. Taylor, 5 Hill (N. Y.), 587, where a debtor residing in Baltimore, in failing circumstances, sent goods to Taylor & Co., at New York, to be delivered to plaintiff in part payment of a debt due to him, at the same time sending to plaintiff a letter apprising him of the fact, and the goods were received by Taylor & Co., and sold within a few days, it was held that plaintiff might recover the value of the goods so sent to him; that the arrangement being beneficial to the plaintiff, his assent might be presumed, on the principle that a trust created for the benefit of a third person, though without his knowledge, may be subsequently adopted and enforced by him. The acceptance of a deed delivered to a stranger for the use of a grantee, will be presumed. Church v. Gilman, 15 Wend. (N. Y.) 656. The question of acceptance is one of fact. Sturtevant v. Orser, 24 N. Y. 538.

[69] Co. Litt. 261 a, note 1, in Harg. & Butl. ed.

[70] Co. Litt. 122 a, note 7, Harg. & Butl. ed.; Lofft, 364, title, Separate Fishery; Partheriche v. Mason, 2 Chitt. 658.

[71] Lofft, 358; 1 Roll. Abr. 392. l. 5.

[72] Pring v. Pearcy, 7 B. & C. 304.

[73] Lofft, 359; *per* GIBBS, Ch. J., in

two proprietors on opposite sides of a river not navigable, that is to say, above the ebb and flow of the tide, own *usque filum aquae;* and the proprietor of both sides owns the whole.[74]

As before remarked, these incidental or presumptive rights are not inseparable. The presumption may, therefore, be rebutted.[75] Thus the presumption that the right of minerals accompanies the fee, may be rebutted by showing a user by others.[76]

Other presumptions are founded on the dictates of prudence and discretion; as that regular and ordinary means are adopted for a given end. Hence, where the means calculated to attain a certain end appear to have been adopted, or the end itself appears to have been attained, a technical and particular completion in the one case, or all the ordinary previous steps in the other, need not be proved, but will be presumed; especially if the absence of particular proof is accounted for. Thus proof of sealing and delivery without the signing of a deed, the usual place on the deed for this being mutilated, would doubtless warrant the presumption that the deed was signed. So if the deed is lost. So where the attestation says only "sealed and delivered," in a case where you are put to proof of the subscribing witness's handwriting; or where there is no attesting witness; but you prove the parties' hand to a paper sealed, with the usual attestation, "sealed and delivered," the paper being in your hands and for your benefit; or in the ordinary case of establishing a contract by simply proving the signature to be in the handwriting of the party to be charged. In all these cases something is wanting in the direct proof; the handwriting in one case, the sealing in another, the delivery in another, yet the facts which are proved lead irresistibly to the presumption that the other acts requisite to give validity to the instrument were, in truth, done, and the law applies the maxim, *Omnia praesumuntur recte solemniter esse acta, donec probetur in contrarium.*[77] This is a maxim of extensive application in the law of presumptive evidence; and where direct proof is beyond the party's reach, or in

Grose v. West, 7 Taunt. 41; Watrous v. Southworth, 5 Conn. 305; Cook v. Green, 11 Price, 736.

[74] *Ex parte* Jennings, 6 Cow. (N. Y.) 518; 2 Dane's Abr. 692, § 13; Waters v. Lilly, 4 Pick. (Mass.) 145; Commonwealth v. Chapin, 5 Pick. (Mass.) 199; Mason v. Hill, 3 B. & Ad. 76; Fleming v. Kenney, 4 J. J. Mar. (Ky.) 158; and Scott v. Wilson, 3 N. H. 321.

[75] 1 Roll. Abr. 401; 16 Ves. 390; Co. Litt. 122 a, note of Harg. & Butl.; Lade v. Shepherd, 2 Str. 1004; Grose v. West, 7 Taunt. 39.

[76] Rowe v. Grenfel, Ry. & M. 396.

[77] See 12 Wheat. 70.

cases where it is not reasonably to be expected, comes in aid of numerous defects.[78]

Where the bargain and sale for a year and the release bear date the same day, the former will be presumed to have been first executed, this course having been necessary to give them validity as a conveyance. And so of any other and like modes of conveyance.[79] So where a witness attested only the last sheet of a will, all the sheets were presumed to have been in the room.[80] Or if all the witnesses are dead, a regular execution is intended from proof of their handwriting.[81] So a deed will be presumed to have been delivered on the day of its date.[82] And having a seal at the trial, will be presumed to have had one when delivered, although the subscribing witness remembers no seal.[83] In the absence of a corporate seal, no presumption could arise that a corporate deed was executed by authority, and it is incumbent on the party relying on it to show it was signed by persons authorized to do so.[84] A patent from the State will be presumed to have borne the great seal, although the exemplification is marked "L. S." only.[85] And after a few years' possession and exercise of corporate rights by an ecclesiastical corporation, formed under the New York statute, it will be presumed that the proper officer was present at the formation, although the certificate of the proceedings omits to mention that circumstance.[86] So a judicial confirmation of a sale made under a decree, by a trustee, was presumed.[87] A contract by A. to work for B., and another bearing the same date, and having the same subscribing witness, by which B. promised to pay A. a certain sum in a certain way, were intended the one to form the consideration of the other.[88]

It has been a matter of much litigation, how far the maxim,

[78] M'Queen v. Farquhar, 11 Ves. 467; Burrowes v. Lock, 10 Ves. 470; Pigot v. Holloway, 1 Binn. (Penn.) 436; Rex v. Catesby, 2 B. & C. 814; Gaston v. Mason, 1 N. J. Eq. 10; Curtis v. Hall, 4 N. J. L. 148; Newbold v. Lamb, 5 N. J. L. 449; Churchill v. Speight, 2 Hayw. (N. Y.) 338; Rex. v. Witchurch, 7 B. & C. 573.

[79] Barker v. Keate, 1 Freem. 251; Atkyns v. Horde, 1 Burr. 106.

[80] Bond v. Seawell, 3 Burr. 1773.

[81] Hands v. James, 4 Conn. 531; Brice v. Smith, Willes, 1; Croft v. Pawlet, 2 Str. 1109.

[82] Breckenridges v. Todd, 3 Monroe, 54, 55; Shep. Touch. 72.

[83] Ball v. Taylor, 1 C. & P. 417.

[84] Bale v. Todd (Ga., 1905), 50 S. E. 990.

[85] Williams v. Sheldon, 10 Wend. (N. Y.) 654.

[86] All Saints' Church v. Lovett, 1 Hall (N. Y.) 191.

[87] Shilknecht v. Eastburn's Heirs, 2 G. & J. (Md.) 114.

[88] Aldridge v. Birney, 7 Monr. (Ky.) 344, 347.

Omnia praesumuntur rite esse acta, shall prevail in establishing the jurisdiction of a court or magistrate. In England it is not admissible as to the *facts* which constitute a special and limited jurisdiction,[89] although it is otherwise of courts having general jurisdiction. In the former case, in order that the party may avail himself of the proceeding, he must not only plead, but prove the facts which go to the question of jurisdiction.[90] But in Massachusetts, there appearing on the files of the Probate Court a record of assignment of dower regular on its face, the Supreme Court intended that a regular application by the widow was made, or her assent given for that purpose.[91] And in Pennsylvania the maxim was expressly applied to support the summary proof of a will in a County Court of Virginia; the court saying, "To the act of the County Court in holding jurisdiction of the subject of probate, the maxim, *Omnia,* etc., is as applicable as the judicial proceedings of our own State."[92] In New York, as to these foreign proceedings, which are unknown to the common law, the cases appear to conflict. In one, which was the case of a New Jersey attachment of a vessel by a material-man, it was sustained on the presumption that the law of that State warranted the proceeding.[93] But in another case, which related to a specific delivery of real estate under an execution, in satisfaction of a judgment of Vermont, a very common proceeding in New England, it was placed upon the ground of a strictly foreign proceeding unknown to the common law, jurisdiction of which must be shown by pleading the local statute and proving it.[94] But by this and several other cases, it is agreed that upon a common-law question that law shall be presumed to prevail in a neighboring State until the contrary be shown.[95] This subject, however, belongs more properly to the future head which treats of the mode of proving domestic and foreign judgments and other judicial proceedings. It will be presumed that a commission has been returned by mail as required by statute and opened by the justice issuing it;[96] that arbitrators have acted within the

[89] *Per* HOLROYD, J., in Rex v. All Saints, 1 M. & Ry. 668.

[90] Rudd v. Johnson, 5 Litt. (Ky.) 19; also stated *supra,* pl. 9, of this note.

[91] Tilson v. Thompson, 10 Pick. (Mass.) 359, 363.

[92] Ripple v. Ripple, 1 Rawle (Penn.), 386.

[93] The Stamford Steamboat Co. v. Gibbons, 9 Wend. (N. Y.) 327.

[94] Holmes v. Broughton, 10 Wend. (N. Y.) 75.

[95] Walker v. Maxwell, 1 Mass. 103; Legg v. Legg, 8 Mass. 99.

[96] Hall v. Barton, 25 Barb. (N. Y.) 274.

time set for their award,[97] on all the matters submitted;[98] that the three assessors have acted together, though only two of them have signed the report;[99] that the three commissioners of highways were present in the laying out of a private road;[100] that an act shown to have been done was done at the right time.[101] But the law will not presume a fact requisite to confer jurisdiction in a special proceeding;[102] though there is a presumption in favor of the regularity of the proceedings of a board of officers;[103] and in favor of the jurisdiction of the surrogate over the estate of a decedent, after a lapse of many years.[104]

Other presumptions are referable to the policy of the law. An instance under this head is the presumption in favor of cross remainders when the land is devised between two persons as tenants in common in tail, and the contrary when between more than two.[105] This rule is, of course, confined to devisees, and is subject to various modifications and exceptions arising from the particular language of the will.[106]

Again: the presumption is, that money borrowed by the husband, on the security of the wife's real estate, is appropriated solely by him, the money being under his absolute control, in virtue of the power conferred by the marital right.[107] Hence, she and her personal representative have a right in equity to demand of him and his representatives, that his estate shall be first applied in discharge of the incumbrance, so as to relieve her estate.[108] This, however, being but an equity, may be rebutted by another equity,

[97] Owen v. Boerum, 23 id. 187.

[98] Ott v. Schroeppel, 6 N. Y. 482.

[99] Doughty v. Hope, 3 Den. (N. Y.) 249, 594; 1 N. Y. 79.

[100] Tucker v. Rankin, 15 Barb. (N. Y.) 471.

[101] Sheldon v. Wright, 7 Barb. (N. Y.) 39.

[102] People v. City of Brooklyn, 21 Barb. (N. Y.) 484.

[103] People v. Carpenter, 24 N. Y. 86.

[104] Bolton v. Brewster, 32 Barb. (N. Y.) 389.

[105] 2 Bl. Com. 381.

[106] See Perry v. White, Cowp. 777; Phipard v. Mansfield, Cowp. 797, 800; Burden v. Burville, 2 East, 47, 48, note; Holmes v. Meynel. T. Jones, 172; Atherton v. Pye, 4 T. R. 710; Cooper v. Jones, 3 B. & Ald. 425, 429; Staunton v. Peck, 2 Cox C. C. 8; Watson v. Foxton, 2 East, 36, 40; Roe v. Clayton, 6 East. 628; Gorges v. Webb, 1 Taunt. 234; Green v. Stephens, 17 Ves. 64; Comber v. Hill, 2 Str. 969; Davenport v. Oldis. 1 Atk. 579; Dyer v. Dyer, 19 Ves. 612; Jones v. Randall, 1 J. & W. 100.

[107] Earl of Kinnoul v. Money, 3 Swanst. 208, note.

[108] Neimcewicz v. Gahn, 3 Paige (N. Y.), 614; Tate v. Austin, 1 P. Wms. 264; Lord Huntingdon's Case, 2 Vern. 437; Astley v. Earl Tankerville. 3 Bro. C. 545; Earl of Kinnoul v. Money, 3 Swanst. 208, note *a*. And see Pocoke v. Lee, 2 Vern. 604; and Clinton v. Hooper, 1 Ves. Jr. 173.

which may be set up by parol proof.[109] As if the money was raised to pay off her debts due *dum sola*;[110] or for her private use;[111] even though she should afterwards make a present of the money to him.[112] And so, in general, where the money is raised partly for the use of each.[113] Where the wife purchases a chattel on her personal credit, and the husband takes it into his possession and uses it, the title is held to vest in him.[114]

In some cases, the mere want of presumption on the one side is a sufficient presumption in favor of the other; for wherever the nature of a subject leaves it perfectly indifferent whether a given fact does or does not exist, the party who founds his claim or his defense upon the existence of it, must remove that indifference; and the opposite party may rely upon the single argument that nothing appears in opposition to him; and that *de non apparentibus et non existentibus eadem est ratio*.[115]

A presumption may be inferred on any subject. Thus, a deed delivered to the father or guardian of infants is presumed to be delivered to them.[116] Knowledge by Congress of the boundaries of a State, and of its political subdivisions, may reasonably be presumed.[117] A woman is presumed in law capable of bearing children as long as she lives, as far as age is concerned.[118] There is no presumption of law or of fact that a man or a woman is single, nor is there any presumption to the contrary,[119] but every man is presumed solvent until proved insolvent.[120] Changes in form in an existing lien will not, as a matter of law, amount to an increase of hazard under a policy of fire insurance. The insurer has the burden of proving an increase of hazard.[121]

Where the existence of one fact so necessarily and absolutely induces the supposition of another, that if the one is true the other

[109] *Per* Lord HARDWICKE, in Earl of Kinnoul v. Money, 3 Swanst. 202, 208, note *a*.

[110] Lewis v. Nangle, Ambl. 150; Earl of Kinnoul v. Money, 3 Swanst. 202, note; Baget v. Oughton, 1 P. Wms. 347.

[111] Clinton v. Hooper, 1 Ves. Jr. 188.

[112] Clinton v. Hooper, 1 Ves. Jr. 188.

[113] Lewis v. Nangle, Ambl. 150.

[114] Glann v. Younglove, 27 Barb. (N. Y.) 480.

[115] 2 Ev. Poth. 329, No. 16, § 14.

[116] Coleman v. Coleman, (Ill., 1905), 74 N. E. 701.

[117] Virginia v. Tennessee, 148 U. S. 503, 13 S. Ct. 728.

[118] Hill v. Spencer, 196 Ill. 65, 63 N. E. R. 614.

[119] Bennett v. State, 103 Ga. 66, 29 S. E. 919; 68 Am. St. Rep. 77.

[120] Warren v. Robison, 25 Utah 205, 70 Pac. 989.

[121] Greenlee v. North British and Mercantile Insurance Co., 102 Iowa 427, 71 N. W. 534; 63 Am. St. Rep. 455.

cannot be false, as where *connection* is inferred from *pregnancy*, the term presumption cannot be legitimately applied; for the nature of presumption is, that it does not require to be substantiated, but that it may be defeated by positive contradiction, according to the maxim, *Stabitur presumptioni donec probetur in contrarium*.[122] The distinction between presumption and proof is, that the one may be false, but until shown to be so, must be regarded as true; that the other (the facts upon which it is founded being admitted) cannot be otherwise than true.[123]

[122] Lofft's Gilb. 303.

[123] 2 Ev. Poth. 329, No. 16, § 14.

CHAPTER IV.

Hearsay Evidence.

Section 72. General rule.
73. What is hearsay.
74. Exceptions to the rule.

Sec. 72. General Rule.

It is a universal general rule that *mere hearsay evidence is not admissible to establish any specific fact which, in its nature, is capable of being proved by witnesses who speak from their own knowledge*;[1] or, in other words, that evidence, whether written or spoken, which does not derive its credibility solely from the credit due to the witness himself, but rests in part upon the veracity and competency of some other person, from whom the witness received the information, is not admissible to establish a substantive fact. And this is the rule, *although the declaration sought to be proved was at the time when it was made, against the interest of the person making it*,[2] *and although no other evidence can possibly be obtained*,[3] *as, where it is the declaration of a person who was the only eye witness to the transaction and who is dead*,[4] *or of a wit-*

[1] Page v. Parker, 40 N. H. 47; Scales v. Desha, 16 Ala. 308; Chapin v. Taft, 18 Pick. (Mass.) 379; Buckley v. Cunningham, 34 Ala. 69; People v. McCrea, 32 Cal. 98; Penniman v. Patchin, 6 Vt. 325. The rule is of modern origin, and the earliest case in which it was acted upon is Sampson v. Yardley, 2 Keb. 223. The leading case in this country is Mima Queen v. Hepburn, 7 Cranch (U. S.), 290, confirmed in Davis v. Wood, 1 Wheat. (U. S.) 6, and althought at one time opposed in some of the States, is now universally followed in all of them.

[2] Gordon v. Bowers, 16 Penn. St. 226; Fitch v. Chapman, 10 Conn. 8; Bailey v. Wood, 24 Ga. 164; Macon, &c., R. R. Co. v. Davis, 27 id. 113; Coble v. McDaniel, 33 Mo. 363; Wiswall v. Kenevais, 18 Ala. 65.

[3] Mima Queen v. Hepburn, 7 Cranch (U. S.), 296; Ferry v. Frystone, 2 East, 54.

[4] 1 Phillips Ev. 214 (Am. ed.). In Harper v. Scott, 12 Ga. 125, the declaration of a deceased person as to the loss of a paper was held inadmissible to establish a ground for letting in secondary evidence of its contents; and in Smothers v. Mudd, 9 B. Mon. (Ky.) 490, it was held that neither a person's death or absence from the State could be proved by general reputation or hearsay. See also State Bank v. Seawell, 18 Ala. 616. But in some of the cases it is held that the *death* of a person may be proved by hearsay, Jackson v.

ness who keeps out of the way to avoid being subpoenaed on the trial.[5] The fact that the statement was sworn to in an affidavit, or upon a trial in another cause, or that it has been made the subject of an entry in an account or other book,[6] or even though it has been repeated by one of the parties, does not strip it of its character as hearsay or render it admissible.[7]

The reason for this rule is, that such evidence requires credit to be given to the statements of a person who is not under the obligations of an oath or any of the ordinary tests for ascertaining the truth of the statement, being subject neither to cross-examination by the party to be affected by his testimony, nor present in court so that his deportment can be observed, nor so situated in reference to the case, that his character or motives can be investigated.[8] Another very forcible reason for the rule is, that such evidence can be fabricated with comparative safety to the witness, as he cannot ordinarily be convicted of perjury, as the testimony of two witnesses, or at least full proof of the falsity of his statement, is necessary. So. too, there is great danger, however honest or conscientious the witness may be, that the statement made by such person may have been imperfectly heard or understood, or inaccurately remembered; therefore it would seem that the rule is founded upon correct principles, and is sound in policy. As we shall see hereafter, this rule is subject to many exceptions, and it is sometimes quite difficult to determine whether a given case comes within the rule or the exception.

Sec. 73. What is Hearsay.

Whenever a witness states that of which he is not personally cognizant, but has derived from some third person, his testimony

Boneham, 15 John. (N. Y.) 226, but that neither the *time, place nor manner* of his death can be shown by that species of evidence. Jackson v. Etz, 5 Cow. (N. Y.) 314; nor can the presumption of death arising from an absence of seven years be rebutted by such evidence. Smothers v. Mudd, *ante.* The fact that the declaration was made by a person since deceased does not render it admissible. Dewey v. Goodenough, 56 Barb. (N. Y.) 54; Gray v. Goodrich, 7 John. (N. Y.) 95; Spatz v. Lyons, 55 Barb. (N. Y.) 476.

[5] Woodward v. Paine, 15 John. (N. Y.) 493.

[6] Churchman v. Lewis, 34 N. Y. 444; Miller v. Clark, 5 Lans. (N. Y.) 388; Patterson v. Maryland Ins. Co., 3 H. & J. (Md.) 71.

[7] Stephens v. Vrooman, 16 N. Y. 381.

[8] Gray v. Goodrich, 7 John. (N. Y.) 96; Sparge v. Brown, 9 B. & C. 938; Sutton v. Ridgway, 4 B. & Ald. 55.

is clearly hearsay, and, except in the special instances which will be hereafter referred to, is not admissible. Thus, upon an issue as to whether a person was pecuniarily responsible at a certain time, it is, as held by most of our courts, not competent for a witness to state what his "understanding" in reference to the matter, as acquired from other persons, is; but he must also speak from his personal knowledge.[1] A witness who has made an investigation as to the financial condition of another may testify as to it but he cannot testify as to his general financial reputation.[2] But it is no departure from the rules of evidence to prove the notoriety in the neighborhood of a fact already proved to exist, to lay the foundation for an inference that a resident was cognizant of the fact.[3] However, it has been held that evidence is admissible of the general reputation of a deceased person as a careful and prudent man

[1] Caswell v. Howard, 16 Pick. (Mass.) 567; Green v. Caulk, 16 Md. 556. While the fact of insolvency cannot be proved—as a rule—by hearsay evidence, Molyneaux v. Collier, 13 Ga. 406; Walker v. Forbes, 25 Ala. 139; Vaughan v. Warnell, 28 Tex. 119, in most of the States, yet in some of them it is held that a person's pecuniary responsibility may be shown by his general reputation in that respect *at the time in question*, Bank of Middleburg v. Rutland, 33 Vt. 414; and in Michigan it has been held that, in the case of an assignment for the benefit of creditors, evidence of general reputation is admissible to show the pecuniary standing and condition of the assignee, and even his actual insolvency, to establish fraud. Angel v. Rosenbury, 12 Mich. 241. See also Mminger v. Knox, 8 Minn. 140, where it was held that a person's insolvency might be shown by hearsay. In Vermont the rule is that, when the question at issue is in reference to the pecuniary responsibility of a person, a witness may be allowed to express his opinion as to such person's solvency *as derived from a personal acquaintance with him, and from his reputation in this respect in the community where he resides.* Hand v. Brown, 18 Vt. 87.

[2] Wolfson v. Allen Brothers' Co., 120 Iowa, 455, 94 N. W. 910; Coleman v. Lewis, 183 Mass. 485, 67 N. E. R. 603.

[3] Tenn. Coal, etc. R. R. Co. v. Linn, 123 Ala. 112, 26 So. 245, 82 Am. St. Rep. 108. Thus, where the defendants represented to the plaintiff that an insolvent person was good for his contract, hearsay was held admissible to prove the notoriety of the insolvency in the neighborhood, and established a presumption that the defendants knew it when they represented him otherwise. Ward v. Herndon, 5 Port. (Ala.) 382. So where it is sought to bring home to a person knowledge of a certain fact, evidence of the general belief among his neighbors, of the existence of the fact, is admissible. Benoist v. Darby, 12 Mo. 196. Thus, proof that the burning of a warehouse was generally known in the town where it was situated, is admissible to bring home a knowledge of the fact to one who had cotton destroyed by the fire, who lived within twenty or twenty-five miles of the place, and traded in it, and, two months after the fire, executed his note for an advance on the cotton. Jones v. Hatchett, 14 Ala. 743. But see Oden v. Stubblefield, 4 Ala. 40, where it was held that in order to show that the husband knew certain facts relative to his wife, it was not competent to show that the matter was spoken of in his family in the presence of his wife.

to show that he used due care in the accident which caused his death, in the absence of other evidence of the facts.[4] In an action for assault and battery a witness may testify to his knowledge of the plaintiff's reputation in the community where the plaintiff at the time resided.[5]

Such evidence is not admissible to establish the *value* of property, although such understanding was derived from persons who buy and sell that species of property,[6] or who are regarded as experts in such matters. Thus, the report of a state fair committee on agriculture upon the value of a patented drill was held mere hearsay and not admissible.[7] But where the speed of a horse is in question the official annual reports of a trotting association have been held admissible to prove the record of the horse.[8] An appraisal of property sold under an execution, made by appraisers appointed for that purpose, is not admissible to establish the actual value of the property in question in an action by a person claiming to be its owner;[9] nor are letters written by the plaintiff to third persons tending to show a conversion of such property by the defendant, admissible to make out a conversion;[10] nor is it competent for one member of a family to testify as to what another member of the family, who is dead, told him a certain family portrait cost;[11] nor for one member of a firm to testify as to what another member of the firm told him the latter paid for certain goods purchased by him for the firm.[12] General reputation is not competent evidence to prove a partnership,[13] but the transactions of parties bearing upon the point may be received if not objectionable on general principles;[14] nor is such evidence admissible to establish the fact of agency, and the evidence must go to acts done by the alleged agent and ratified by the principal;[15] nor to prove who are officers

[4] Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435.

[5] Halley v. Tichenor, 120 Iowa 164, 94 N. W. 472.

[6] Green v. Caulk, 16 Me. 556; Williamson v. Dillon. 1 H. & G. (Md.) 444. In Heath v. West, 26 N. H. 191, it was held that neither the qualities or value of a horse can be proved by reputation. See also Prescott v. Hayes, 43 id. 593, where it was held that proof of rumors which, if true, would affect the value of certain property, is not admissible upon the question of value.

[7] Gatling v. Newell, 9 Ind. 572.

[8] Pittsburg, etc. Ry. Co. v. Sheppard, 56 Ohio State, 68, 46 N. E. 61; 60 Am. St. Rep. 732.

[9] Flannigan v. Althouse, 56 Iowa, 513.

[10] David v. David, 66 Ala. 139.

[11] Houston, &c., R. R. Co. v. Burke, 55 Tex. 323.

[12] Williamson v. Dillon, *ante*.

[13] Marks & Stix v. Hardy's Administrator (Ky.), 78 S. W. 864.

[14] Hicks v. Crane, 17 Vt. 499; Hersom v. Henderson, 23 N. H. 498.

[15] Perkins v. Stebbins, 29 Barb.

of a private corporation.[16] The character of a house cannot be proven by evidence of its reputation,[17] but where the character of a person is in issue it may be shown only by evidence of general reputation. So in an action for an indecent assault, the defendant may not put in evidence of specific immoral acts by the plaintiff.[18] Where one accused in a criminal case goes upon the stand his general reputation for truth may be shown against him but it may not be shown that he was "a little fussy" where he has not put his character in evidence.[19]

In an action for the conversion of property against an officer who took it under process as the property of a person in whose possession it was found, it is not competent for the plaintiff, in order to establish his title to the property, to show that such person had stated to others that he borrowed the property of the plaintiff.[20] Neither hearsay evidence or general reputation is admissibe to establish the title to property, either personal[21] or real.[22] Thus, where a party offered evidence to show that the land in controversy had been called the land of "I. S.," under whom he claimed, it was held inadmissible.[23] The fact that property was assessed to a certain person, is not admissible in an action in such person's favor to establish his title thereto;[24] nor are letters written by third persons, not parties to the suit, competent evidence.[25]

Statements by a party in his own favor are not admissible in evidence unless they are part of the *res gestae*. In one case where the possession of money was in issue and the mortgagor claiming to have the money claimed it was buried in a jar in the cellar, she went down cellar with her daughter at one time and pointed out the place in the cellar where she said the money was buried, it was held that this statement was not admissible as part of the *res gestae* for the reason that neither the mortgagor nor her daughter

(N. Y.) 523; Blevins v. Pope, 7 Ala. 371; Trowbridge v. Wheeler, 1 Allen (Mass.), 162.

[16] Litchfield Iron Co. v. Bennett, 7 Cow. (N. Y.) 234.

[17] Ramsey v. Smith, 138 Ala. 333, 35 So. 325.

[18] Miller v. Curtis, 158 Mass. 127, 32 N. E. 1039; 35 Am. St. Rep. 469.

[19] State v. Foster, 130 N. C. 666, 41 S. E. 284; 89 Am. St. Rep. 876. See also § 57, *ante*.

[20] King v. Frost, 28 Minn. 417.

[21] Allen v. Protee, 40 Ala. 358; Whitsett v. Slotee, 23 id. 626; Corley v. State, 28 id. 22.

[22] School District v. Blakeslee, 13 Conn. 227; McKunion v. Bliss, 21 N. Y. 206; Parker v. Pierce, 16 Iowa, 227; Howland v. Crocker, 7 Allen (Mass.), 153.

[23] School District v. Blakeslee, 13 Conn. 227; Urkett v. Corgall, 5 W. & S. (Penn.) 60.

[24] Adams v. Hiscock, 55 Iowa, 632.

[25] Simpson v. Smith, 27 Kan. 565.

actually saw the money or the jar in which it was contained.[26] In an action against a sheriff for alleged wrongful conversion by an attachment a statement of the defendant in a suit in which the attachment took place that he had "sold out" to the plaintiff in the suit against the sheriff is inadmissible, being a self-serving statement.[27] A report made in the usual course of business by a conductor of a street car to his company on the day of an accident of the number of passengers carried on that trip is admissible although the conductor has previously testified to the same facts as stated in his report. The court considered the report as not within the rule as to self-serving declarations as it was made in the course of duty and before the witness had any knowledge that the accident had occurred and is admisible to sustain testimony on the stand as against the possible objection of interest as being in the service of his employers.[28]

Where the belief of a party is in issue, as in a charge of fraud against an official of a bank depending on his knowledge of the insolvency of the bank, the party may be allowed to testify to his belief.[29] The knowledge of the prevalence of a certain disease, gained by government officials by correspondence in the course of their official duty, is not hearsay.[30] Testimony will not be excluded as hearsay even though there is great probability that much of it was founded on hearsay if given in answer to a question as to the knowledge of a witness. If it is hearsay it is encumbent upon the objector to make that fact appear to the court.[31]

Words spoken while asleep come from an unconscious condition, they have little or no meaning; they are as likely to refer to unreal facts or conditions as things real; they are wholly unreliable and not admissible in evidence, so statements of a plaintiff while asleep after being bitten by a dog are not admissible to show his nervous condition of mind. Such testimony is inadmissible as hearsay.[32] Where a witness testifies in a foreign language which

[26] Pinney v. Jones, 64 Conn. 545, 30 A. 762, 42 Am. St. Rep. 209.

[27] Lumm v. Howells, 27 Utah 80, 74 Pac. 432.

[28] Callihan v. Washington Water Power Co., 27 Wash. 154, 67 P. 697, 91 Am. St. Rep. 829.

[29] Cassidy v. Uhlman, 163 N. Y. 380, 57 N. E. 620, 79 Am. St. Rep. 596.

[30] Grayson v. Lynch, 163 U. S. 468, 16 S. Ct. 1064.

[31] Sloan v. Hunter, 56 S. C. 385, 34 S. E. 658, 76 Am. St. Rep. 551.

[32] Plummer v. Ricker, 71 Vermont, 114, 41 A. 1045, 76 Am. St. Rep. 757. See, also, People v. Robinson, 19 Cal. 40.

is translated to the court by an interpreter one who heard the interpreter but did not understand the foreign language cannot be called to prove the testimony unless the interpreter was employed by and acted as the agent of the foreign witness. In that case the language of the interpreter is to be taken as the language of the man who employed him and speaks through him but not if an official interpreter is used.[33] A witness may testify to a conversation over the telephone with the office of another party to the suit if he can swear that he recognized the voice of the person with whom he talked as that of one of the employees in the office although he does not remember the name.[34]

The consideration in a deed is hearsay as to third parties.[35] Medical works or recitals from them are inadmissible as hearsay.[36] Recitals in a private statute, or in the petitions on which it is based, as to a prior confiscation of land by the State, are not evidence of the confiscation.[37] A bill of exceptions setting forth the testimony of a witness is not evidence of what the testimony was to be used in another proceeding.[38] Parol evidence is admissible to show who occupied a certain public office at a certain time without producing the commission of the officer as the evidence was of a fact and not of a conclusion.[39]

Sec. 74. Exceptions to the Rule.

To the general rule relating to hearsay evidence, there are, from necessity, several exceptions, which are as well established as the rule itself, and a thorough knowledge of the application of which is of the highest importance to the practitioner. These exceptions are mainly embraced under the following heads:

1st. Relating to matters of general or public concern.
2d. Pedigree.
3d. Ancient possession.
4th. Boundaries.

[33] State v. Terline, 23 R. I. 530, 51 A. 204, 91 Am. St. Rep. 650.
[34] Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.
[35] Spohr v. Chicago, 206 Ill. 441, 69 N. E. R. 515.
[36] Baily v. Kreutzmann, 141 Cal. 519, 75 Pac. 104.
[37] Davis v. Moyles, 76 Vt. 25, 56 A. 174.
[38] Edwards v. Gimbel, 202 Penn. 30, 51 A. 357.
[39] State v. Haskins, 109 Iowa, 656, 80 N. W. 1063, 77 Am. St. Rep. 560.

5th. Dying declarations.

6th. Declarations against interest by persons deceased.

7th. Declarations or entries made in the course of office or business (*res gestae*).

8th. Testimony given by a witness on a former trial, since deceased.

9th. Admissions by parties in interest.

CHAPTER V.

Hearsay to Prove General or Public Rights.[1]

Section 75. Admissible to prove public rights.
76. Meaning of terms "public" and "general."
77. When independent proof is not necessary.
78. Application of the exception.
79. Instances in which such evidence has been rejected.
80. Must be *ante litem motam*.

Sec. 75. Admissible to prove Public Rights.

Hearsay evidence is admissible as to questions relating to matters of public or general interest.[2] The term "interest," as employed in this rule, means *pecuniary* interest, *or some interest by which the legal rights or liabilities of a class of the community are affected;*[3] and the grounds of admissibility are, that, as the origin of such rights is generally ancient and obscure, they are usually incapable of direct proof, and because, as to local matters, all persons living in the neighborhood and interested in them are likely to be conversant, as common rights are naturally the subject of common and public conversation, in the course of which statements are made which, uncontradicted, are likely to be true, and thus a trustworthy reputation may arise from the concurrence of many unconnected with each other, and interested in investigating the truth;[4] and it is this prevailing current of assertion that is resorted to as evidence, for it is to this that every member of the community is supposed to be privy, and to contribute his share.[5]

Traditionary evidence of public rights is confined to matters which are incapable of proof by living witnesses.[6] Testimony of a witness that it had been the general reputation in the community

[1] For a consideration of hearsay in private matters and of the distinction between public and private rights, see *post*, sec. 88.

[2] Berkley Peerage Case, 4 Camp. 415; Morewood v. Woods, 14 East, 329; Weeks v. Sparke, 1 M. & S. 686; R. v. Bedfordshire, 4 E. & B. 535.

[3] The interest may be negative, as to negative public liability; Queen v. Bedfordshire, 4 E. & B. 535.

[4] Lord Campbell in R. v. Bedfordshire, 4 E. & B. 541.

[5] Wright v. Tatham, 7 Ad. & El. 366.

[6] City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740, 746.

that the land was public ground is inadmissible as the only reputation which is admissible to establish such facts is that of a past generation.[7] This species of evidence is also admissible to prove a matter of a public nature coming in question incidentally in a private controversy.[8]

Sec. 76. Meaning of the Terms "Public" and "General."

In speaking of matters of public and general interest, the terms public and general are sometimes used as synonyms, meaning merely what concerns a multitude of persons.[1] But, in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term *public* being strictly applied to that which concerns every member of the State; and the term *general* being confined to a lesser, though still a considerable, portion of the community. This distinction should be carefully attended to, because in matters strictly public, such, for example, as a claim of highway or a right of ferry, reputation from any one appears to be receivable; and although declarations would be almost worthless, unless made by persons who, by living in the neighborhood, or by frequently using the road or ferry, or the like, are shown to have had some means of knowledge; yet the want of such proof of their connection with the subject in question seems to affect the value only, and not the admissibility, of the evidence. If however, the right in dispute be simply general; that is, if those only who live in a particular district, or adventure in a particular enterprise, are interested in it, hearsay from persons, wholly unconnected with the place or business, would be, not only of no value, but probably altogether inadmissible.[2]

[7] Dawson v. Orange (Conn., 1905), 61 A. 101.

[8] Thomas v. Jenkins, 6 A. & E. 525. See also North Brookfield v. Warren, 16 Gray (Mass.) 171.

[1] Pim v. Curell, 6 M. & W. 234.

[2] Crease v. Barrett, 1 C., M. & R. 929, *per* PARKE, B. By the Roman law, reputation, or common fame, seems to have been admissible in evidence, in all cases; but it was not generally deemed sufficient proof, and, in some cases, not even *semiplena probatio*, unless corroborated; *nisi aliis adminiculis adjuvetur.* Mascardus, De Prob., vol. 1, Concl. 171, n. 1; Concl. 183, n. 2; Concl. 547, n. 19. It was held sufficient, *plena probatio*, wherever, from the nature of the case, better evidence was not attainable; *ubi a communiter accidentibus, probatio difficilis est, fama plenam solet probationem facere; ut in probatione filiationis.* But Marcardus deems it not sufficient, in cases of pedigree within the memory of man, which he limits to fifty-six years, unless aided by other evidence—*tunc nempe non sufficeret publica vox et fama, sed una cum ipsa deberet tractatus et nominatio probari, vel alia adminicula urgentia*

Thus it appears that *competent knowledge in the declarant* is, in all cases, an essential prerequisite to the admission of his testimony; and although all residents are presumed to have that knowledge, in some degree, where the matter is of public concernment, yet, in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required.

adhiberi. Mascard. De Prob. vol. 1, Concl. 411, n. 1, 2, 6, 7.

Thus, in an action of trespass *quare clausum fregit*, where the defendant pleaded in bar a prescriptive right of common in the *locus in quo*, and the plaintiff replied, prescribing in right of his messuage to use the same ground for tillage with corn, until the harvest was ended, traversing the defendant's prescription; it appearing that many persons, besides the defendant, had a right of common there, evidence of reputation as to the plaintiff's right was held admissible, provided it were derived from persons conversant with the neighborhood. Weeks v. Sparke, 1 M. & Sel. 679, 688, 689, *per* Le Blanc, J. The actual discussion of the subject in the neighborhood, was a fact also relied on, in the Roman law, in cases of proof by common fame. "*Quando testis vult probare aliquem scivisse, non videtur sufficere, quod dicat ille scivit quia erat vicinus; sed debet addere, in vicinia hoc erat cognitum per famam, vel alio modo; et ideo iste, qui erat vicinus, potuit id scire.*" J. Menochius, De Præsump. tom. 2, lib. 6, Præs. 24, n. 17, 772. See also Mascardus, de Prob. vol. 1, p. 389, 390, Concl. 395, n. 1, 2, 19, 9, where the law is thus laid down:—"*Confines probantur per testes. Verum scias velim, testes in hac materia, qui vicini, et circum ibi habitant, esse magis idoneos quam alios. Si testes non sentiat commodum vel incommodum immediatum, possint pro sua communitate deponere. Licet hujusmodi testes sint de universitate, et deponant super confinibus suoc universitatis, probant, dummodum proccipuum ipsi commodum non sentiant, licet inferant commodum in universum,*" So, where the question was whether Nottingham Castle was within the hundred of Broxtowe, certain ancient orders, made by the Justices at the Quarter Sessions for the county, in which the castle was described as being within that hundred, were held admissible evidence of reputation; the justices, though not proved to have been residents within the county or hundred, being presumed, from the nature and character of their offices alone, to have had sufficient acquaintance with the subject in dispute, to make the statements in their orders admissible. Duke of Newcastle v. Broxtowe, 4 B. & Ad. 273. Again, where the question related to the custom of mining in a particular district, persons, under whose estates the minerals lay, with respect to which the custom was said to exist, were held to be sufficiently connected with the subject to make their declarations evidence, as they were more likely than others living at a distance to become adventurers, and consequently to be subjected to the operation of the custom. Crease v. Barrett, 1 C., M. & R. 919, 928-930. But where the point at issue was, whether the city of Chester anciently formed part of the County Palatine, an old document, purporting to be a decree of certain law officers and dignitaries of the crown, not having authority as a court, was held inadmissible as evidence of reputation, because those personages had no peculiar knowledge of the subject, excepting what they derived in the course of that unauthorized proceeding. Rogers v. Wood, 2 B. & Ad. 245, 256, recognized by the Court of Exchequer in Crease v. Barrett, 1 C., M. & R. 928, 929; see also Evans v. Taylor, 7 Ad. & El. 617, 626, 627.

Sec. 77. When Independent Proof is not Necessary.

If the quality of the hearsay itself raises a natural inference that it was derived from persons acquainted with the subject, the courts will not require independent proof of that fact; and, therefore, where the question turned on a manorial custom, depositions, purporting to have been made by copyholders in an ancient suit between a former lord and a person claiming admission to a copyhold, were admitted in evidence without proof that the persons making them were either copyholders, or were otherwise acquainted with the customs of the manor; for the courts assumed that such persons would not have been brought forward as witnesses, had they been ignorant of the subject.[7]

Sec. 78. Application of the Exception.

It may be expedient to enumerate a few of the principal questions, which have been deemed to involve matters of public or general interest, and to contrast these with some others, which the courts have considered to be of too private a nature to allow of their being illustrated by evidence of reputation. Thus, hearsay has been admitted where the question related to a right of common,[1] a parochial[2] or other distinct *modus*,[3] a manorial custom[4], a custom of mining in a particular district,[5] a custom of a corporation to exclude foreigners from trading within a town,[6] the limits

[1] Freeman v. Phillipps, 4 M. & Sel. 486. So, an ancient unsigned customary of a manor, which purported to be *ex assensu omnium tenantium*, and which had been handed down with the court rolls from steward to steward, was received as evidence to prove the course of descent within the manor. Denn v. Spray, 1 T. R. 456, 473; see also Chapman v. Cowlan, 13 East, 10. But where, in order to prove the boundaries of a manor, an ancient survey was produced from the proper custody, which purported to have been made in the time of Queen Elizabeth by a deputy surveyor appointed by the crown, and to have been founded on the presentments of certain tenants of the manor, whose names were appended to it, the court rejected the document, *on the ground that no proof had been given that the deputy surveyor had any authority to institute the inquiry*; and stripped of this authority he not only had no right to make any kind of return, but the presumption that he did make one fell to the ground. The paper might have been written by any clerk idling in the office where it was found, from his own imagination, or compiled, possibly, by some interested person in furtherance of a sinister object of his own. Evans v. Taylor, 7 Ad. & El. 617, 626, 627; 1 Taylor on Ev. §§ 418-422.

[2] Weeks v. Sparke, 1 M. & S. 679.

[3] Moseley v. Davies, 11 Price, 162; White v. Lisle, 4 Madd. Ch. 214, 224; Short v. Lee, 2 Jac. & W. 464, 473.

[4] Rudd v. Wright, 1 Ph. Ev. 240.

[5] Doe v. Sisson, 12 East, 62.

[6] Crease v. Barrett, 1 C., M. & R. 919, 928-930.

[6] Davies v. Morgan, 1 C. & J. 587.

of a town,[7] the boundary between counties, parishes, hamlets or manors,[8] or between *old* and *new* land in a manor,[9] a claim of tolls on a public road,[10] the fact whether a road was public or private,[11] a prescriptive liability to repair sea-walls[12] or bridges,[13] a claim of highway,[14] a right of ferry,[15] the fact whether land on a river was a public landing-place or not,[16] the jurisdiction of a court and the fact whether it was a court of record or not,[17] the existence of a manor,[18] a prescriptive right of toll on all malt brought by the west country barges to London,[19] a right, by immemorial custom, claimed by the deputy day meters of London, to measure, shovel, unload and deliver all oysters brought by boat for sale within the limits of the port of London,[20] a claim by the lord of a manor to all coals lying under a certain district of the manor,[21] a custom of electing churchwardens by a select committee,[22] and a prescriptive right to free warren as appurtenant to an entire manor.[23] On a question whether a certain road was a highway, a copper-plate map was produced, in which it was so described; it purported to have been taken by the direction of the churchwardens, and proof was offered that it was generally received in the parish as an authentic map; but Lord Kenyon rejected the evidence.[24] So the production of an old printed map of a county from the custody of a county magistrate, who had it some years in his possession, does not make it admissible to prove the bounds of the county.[25] It would seem, however, that if such a map had been supported by proof

[7] Ireland v. Powell, cited Pea. Ev. 16, *per* Chambre, J., and recognized by Williams, J., in R. v. Bliss, 7 Ad. & El. 555.

[8] Nicholls v. Parker, 14 East, 331, *n.*; Brisco v. Lomax, 8 A. & E. 198; 3 N. & P. 388, S. C.; Evans v. Rees, 10 Ad. & El. 151; Plaxton v. Dare, 10 B. & C. 17; Thomas v. Jenkins, 6 Ad. & El. 525.

[9] Barnes v. Mawson, 1 M. & S. 81.

[10] Brett v. Beales, M. & M. 416, 418, *per* Lord Tenterden.

[11] R. v. Bliss, 7 Ad. & El. 555, *per* Williams, J.

[12] R. v. Leigh, 10 Ad. & El. 398, 409, 411.

[13] R. v. Sutton, 8 A. & E. 516; 3 N. & P. 569, S. C.

[14] Crease v. Barrett, 1 C., M. & R. 929, *per* Parke, B.; Reed v. Jackson, 1 East, 355.

[15] Pim v. Curell, 6 M. & W. 234.

[16] Drinkwater v. Porter, 7 C. & P. 181, *per* Coleridge, J.

[17] Goodtitle v. Dew, Pea. Add. R. 204.

[18] Steel v. Prickett, 2 Stark. 466, *per* Abbott, C. J.; Curzon v. Lomax, 5 Esp. 60, *per* Lord Ellenborough.

[19] City of London v. Clerke, Carth. 181.

[20] Laybourn v. Crisp, 4 M. & W. 320.

[21] Barnes v. Mawson, 1 M. & S. 77, 81. In that case there was evidence of an uniform exercise of the right.

[22] Berry v. Banner, Pea. 156.

[23] Earl of Carnarvon v. Villebois, 13 M. & W. 313.

[24] Pollard v. Scott, Peake, 18.

[25] Hammond v. Bradstreet, 10 Exch. 390.

of its compilation by persons having particular means of knowledge of the bounds, or had been in some way sanctioned publicly as authentic, it might have been admissible as reputation; otherwise there is no reason for attaching more value to an engraved map than to a printed book as evidence of its contents; nor does the current use of it by those who reside in the district delineated in it imply an assent to all its details. An old map commonly used at a manor court to define the limits of copyholds, is not evidence of a highway, though ways may be indicated upon it; especially if it does not purport to describe them as public ways.[26]

The proceedings of a public meeting called for the purpose of considering about repairing a way, at which several present signed a paper stating that it was not a public way, is evidence, though slight, against the right.[27] Even where general reputation is evidence, yet the tradition of a particular fact is not; as that a house once stood in a particular spot.[28] Nor is reputation admissible evidence of a farm *modus*.[29] Where a question of a public way was in issue, the declarations of a deceased occupier of land made whilst planting a tree, stating that he planted it to show the boundary of the road, are not evidence of the public right, for it is not a statement of general reputation, but of a particular fact.[30] The declarations of a deceased lord of the manor as to the extent of the waste are not evidence in extension of it.[31] Where the question was, whether a place was within the limits of a hundred, ancient entries of orders of justices in sessions, stating the place to be within such limits, were held to be evidence of reputation, though the justices were not proved to have been resident within the hundred or county.[32] So the question being whether certain land is in the parish of A. or B., ancient leases, in which they are described as lying in parish B., are evidence that the land is in that parish.[33] In assumpsit for tolls by a lessee of the corporation of Cambridge, an old deed of composition between it and the university, recognizing the right, was admitted in behalf of the plaintiff, though not proved to have been acted upon.[34] But not of a mere award, not

[26] Pipe v. Fulcher, 1 E. & E. 111.
[27] Barraclough v. Johnson, 8 Ad. & El. 99.
[28] Ireland v. Powell, Peake Ev. 15.
[29] Pritchett v. Honeyborne, 1 Y. & J. 135.
[30] R. v. Bliss, 7 Ad. & El. 550.
[31] Crease v. Barrett, 1 C., M. & R. 919.
[32] Duke of Newcastle v. Broxtowe, 4 B. & Ad. 273.
[33] Plaxton v. Dare, 10 B. & C. 17.
[34] Brett v. Beales, M. & M. 416.

proved to have been acquiesced in, nor is an award *inter alios* evidence, as reputation, of the boundary of a parish and count.[35] The finding of a jury, under a commission duly issued out of the duchy court of Lancaster, on the petition of the parties to ascertain the bounds of adjoining manors, was held evidence of such bounds.[36] But an interlocutory order of the same court, containing only a provisional arrangement between the parties, is not evidence of reputation.[37] Generally, a verdict, and judgment thereon, in a matter in which reputation is admissible evidence, is also admissible; so of a decree or inquest of office lawfully authorized. Reputation alone is said to be evidence of the existence of a manor;[38] but it seems that some foundation should be laid by proof of acts done, as holding courts, etc., and the production of a deputation to kill game is not of itself sufficient proof even of a colorable title to a real manor, for the lord of a mere reputed manor may grant one.[39]

The rule with regard to the practice from whom the declarations proceed has been thus laid down: In cases of rights or customs which are not, strictly speaking, public, but are of a general nature and concern a multitude of persons, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighborhood. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary. But where the right is strictly public (a claim of highway, for instance), in which all the public are interested, it is difficult to say that there ought to be any such limitation. In a matter in which all are concerned, reputation from any one appears to be receivable, but almost worthless *unless it came from persons who are shown to have some means of knowledge,* as by living in the neighborhood, or frequently using the road in dispute.[40]

[35] Evans v. Rees, 10 Ad. & El. 151; Wiseman v. Mackenzie, 5 E. & B. 447.

[36] Brisco v. Lomax, 8 Ad. & El. 198.

[37] Pim v. Curell, 6 M. & W. 234.

[38] Steel v. Prickett, 2 Stark. 463.

[39] Rushworth v. Craven, McCl. & Y. 417.

[40] *Per* Parke, B., in Crease v. Barrett, 1 C., M. & R. 919; Doe *d.* Molesworth v. Sleeman, 9 Q. B. 301.

Thus, a document purporting to be a decree of certain persons, the Lord Treasurer and Chancellor of the Exchequer, etc., who had no authority as a court, was held to be inadmissible evidence as reputation on a question whether the city of Chester, before it was made a county itself, formed a part of the county palatinate, because those personages had from their situations no peculiar knowledge of the facts. Rogers v. Wood, 2 B. & Ad. 245. So the answers of the tenants of a manor to an old commission of survey issued

Ancient answers of the customary tenants of a manor, stating the rights of the lord of the manor to *all* mines within it, are evidence even against the freeholders, for this claim affects all the tenants.[41] Declarations of old persons concerning the boundaries of parishes and manors have been admitted in evidence, though they were parishioners, and claimed right of common on the wastes which their declarations had a tendency to enlarge.[42] To prove the dedication of land to public use, this species of evidence is peculiarly applicable, and the declarations of the owner, and the use of the lands for public purposes for a long period of time, can often be shown in no other way.[43] In order to admit evidence of reputation, it is not necessary that the fact of user should be shown,[44] but such evidence without user is entitled to but little weight, and has been held not to be admissible at all.[45] The declarations of persons still alive, are not admissible in proof of reputation.[46]

Sec. 79. Instances in which such Evidence has been rejected.

On the other hand, evidence of *reputation has been rejected* where the question was, what usage had obtained in electing a schoolmaster to a grammar school,[1] whether the sheriff of the county of Chester or the corporation of the city of Chester were bound to execute criminals,[2] whether the lord of a manor had a prescriptive right to all wreck within his manorial boundaries,[3] whether the plaintiff was exclusive owner of the soil, or had a right of common only,[4] whether the land in dispute had been pur-

by the lord, finding the bounds of the manor in his right to *wreck*, are evidence of the former, but not of the latter, they having no peculiar means of knowledge, and the lord's title to such a franchise not being a matter of public concern. Talbot v. Lewis, 1 C., M. & R. 495. Such a claim of wreck is one affecting only the interest of the crown, and not the tenants; and the case differs in that respect from a right of free warren. Earl of Carnarvon v. Villebois, 13 M. & W. 313.

[41] Crease v. Barrett, *supra*.

[42] Nicholls v. Parker, 14 East, 531.

[43] Hunter v. Sandy Hill, 6 Hill (N. Y.), 407; Godfrey v. Alton, 12 Ill. 29.

[44] Crease v. Barrett, *ante*.

[45] Weeks v. Sparks, 1 M. & S. 686; Rushworth v. Craven, McCl. & Y. 417.

[46] Woolway v. Rowe, 1 Ad. & El. 117.

[1] Withnell v. Gartham, 1 Esp. 324, 325, *per* Lord KENYON.

[2] R. v. Antrobus, 2 Ad. & El. 793-795.

[3] Talbot v. Lewis, 1 C., M. & R. 495.

[4] Richards v. Bassett, 10 B. & C. 663, *semble*, *per* LITTLEDALE, J., *sed qu.*

[5] Doe v. Thomas, 14 East, 323.

chased by a former occupier, or was part of an entailed estate, of which he had been tenant for life,[5] what patron formerly had the right of presentation to a living,[6] whether a *farm modus* existed, and what was its nature,[7] whether a party had a private right of way over a particular field,[8] whether the tenants of a particular copyhold estate had the right of cutting and selling wood,[9] and what were the boundaries between two private estates.[10] Where, however, it was shown by direct testimony, the admission of which was unopposed, that the boundaries of the farm in question were identical with those of a hamlet, evidence of reputation as to the hamlet boundaries was let in for the purpose of proving those of the farm; for though it was objected that evidence should not be thus indirectly admitted in a dispute between private individuals, the court overruled the objection, Mr. Justice Coleridge observing that "he never heard that a fact was not to be proved in the same manner when subsidiary as when it was the very matter in issue."[11]

Reputation is admissible as well *against* as in favor of a public right, and it makes no difference whether the declarations expressly negative the right, or set up an inconsistent claim, or simply omit all mention of the right, at a time and upon an occasion when notice of it might reasonably be expected.[12] Reputation, tradition, or hearsay, as it may properly be called, is from necessity admissible to prove historical facts of former ages, about which no contemporaneous living person can testify. This species of evidence is disarmed of much of its danger from the permanent effects which are visible to confirm or contradict it, the number of sources whence it may spring, the number of persons interested in

[6] *Per* Lord Kenyon, in R. v. Eriswell, 3 T. R. 723, questioning Bishop of Meath v. Lord Belfield, 1 Wils. 215.

[7] Wells v. Jesus College, 7 C. & P. 284, *per* Alderson, B.; White v. Lisle, 4 Madd. Ch. 214, 224, 225; Wright v. Rudd, cited 1 Ph. Ev. 241, *per* Lord Lyndhurst. See, however, Webb v. Petts, Noy, 44; Donnison v. Elsley, 3 Eag. & Y. 1396, n.; and cases cited 1 Ph. Ev. 241, n. 2.

[8] *Semble*, *per* Dampier, J., in Weeks v. Sparke, 1 M. & Sel. 691; and *per* Lord Kenyon, in Reed v. Jackson, 1 East, 357.

[9] Blackett v. Lowes, 2 M. & Sel. 494, 500, *per* Lord Ellenborough.

[10] Clothier v. Chapman, 14 East, 331, n. By the Roman law, evidence of reputation seems to have been deemed admissible, even in matters of private boundary. See Mascard. de Prob. vol. 1, p. 391, Concl. 396.

[11] Thomas v. Jenkins, 6 Ad. & El. 525, 529. See also Brisco v. Lomax, 8 Ad. & El. 198, 213.

[12] Coleridge, J., in Drinkwater v. Porter, 7 C. & P. 181; Marquis of Anglesey v. Hatherton, 10 M. & W. 218.

preserving the recollection of the matters in question, and the consequent facilities for detecting false testimony. Rights of public or general interest, which are supposed to have been exercised in times past, partake in some degree of the nature of historical facts, and especially in this, that it is barely possible to obtain original proof of them. The law, consequently, allows them to be proved by general reputation, that is, by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject,[13] and by old documents of various kinds, which, under ordinary circumstances, would be rejected for want of originality, etc.

Sec. 80. Must be ante Litem Motam.

But in order to guard against fraud, it is an established qualification to the exception to the rule, that such declarations, in order to be admissible, *must have been made before any controversy arose relating to the matter about which they were made,* or, in other words, unless they were made *ante litem motam.* This qualification is of the highest importance, as, says Mr. TAYLOR,[1] "the ground on which the declarations of deceased persons are admitted at all is, that they are the natural effusion of a party who is presumed to know the truth and to speak upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth;"[2] and no person is presumed to be thus indifferent in reference to matters in actual controversy, as, when a controversy has once commenced, people generally take sides, and what is then said by them, is said under the bias of their peculiar views or prejudice. Consequently all *ex parte* statements, whether under oath or not, are rejected if they were made subsequent to the date of the controversy.[3]

By the Roman law, the term *lis mota* was applied strictly to the commencement of the action, and had no reference to any antecedent period. But with us the term is given a broader signification, and is understood as being *the commencement of the controversy,* and not necessarily the commencement of the suit.[4]

[13] Crease v. Barrett, 1 C., M. & R. 919.

[1] Taylor on Ev. § 628 (7th ed.).

[2] Lord ELDON in Whitelocke v. Baker, 13 Ves. 514.

[3] Berkley Peerage, 4 Camp. 401; Richards v. Bassett, 10 B. & C. 657; Monkton v. Att'y-Gen., 2 Russ. & My. 160.

[4] Berkley Peerage, 4 Camp. 417;

But it seems that whatever may be the precise limits of the rule of exclusion, *declarations will not be rejected because they were made for the express purpose of preventing a controversy,*[5] *nor,* if no dispute has arisen, *although made in direct support of the title of the declarant;*[6] *and the fact that the declarant stood, or believed that he stood, in pari jure with the party relying on the declaration,* will afford no ground for the rejection of the evidence.[7] In order to exclude this class of evidence upon the ground that a controversy had arisen before the declarations were made, *it must appear that the dispute related to the particular subject in issue.* Bayley, J.,[8] announced the rule as it is now generally held as follows: "The distinction has been correctly taken that *where the lis mota was on the very point,* the declarations of persons would not be evidence, because you cannot be sure that, in admitting the depositions of witnesses selected and brought forward on a particular side of the question, who embark to a certain degree with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota,* and consequently the objection does not apply." But while in one case[9] it was insisted by Mansfield, J., that it made no difference, so far as the question of admissibility was concerned, whether the declarant knew of the existence of the controversy or not, yet in the same case Baron Graham took a contrary ground, and insisted that such declarations are admissible *where the declarant could not have known that a suit was commenced or contemplated,* and this now seems to be the generally accepted rule.[10] The entire rule as to *lis mota* applies with equal force in reference to the declarations of person offered in proof of pedigree.

Monkton v. Att'y-Gen., 2 Russ. & My. 161; Davies v. Lowndes, 7 Scott N. R. 214; Slaucy v. Wade, 1 My. & Cr. 338.

[5] Berkley Peerage, *ante.*

[6] Doe v. Davies, 16 L. J., N. S. 222, Q. B.

[7] Doe v. Tarver, Ry. & M. 141; Moseley v. Davies, 11 Price, 162; Nicholls v. Parker, 14 East, 331, n.; Davies v. Morgan, 1 C. & J. 593; Harwood v. Sims, Wighter, 112; Deacle v. Hancock, 13 Price, 296.

[8] Freeman v. Phillips, 4 M. & S. 497.

[9] Berkley Peerage, 4 Camp. 417.

[10] Brougham, J., in Monkton v. Att'y-Gen., 2 Russ. & My. 147; Reilley v. Fitzgerald, 6 Ir. Eq. 349.

CHAPTER VI.

Hearsay to Prove Pedigree and Relationship.

Section 81. Pedigree, how may be proved.
82. Evidence should come from member of family or undoubted source.
83. What is pedigree.
84. Old documents, inscriptions, etc., admissible to establish.
85. Entries in family bibles and other family records.
86. Declarations of deceased persons.

Sec. 81. Pedigree, How may be Proved.

A second exception to the general rule rejecting hearsay evidence is made in respect to proof of pedigree,[1] and this exception is recognized upon the ground of necessity, and is founded upon the obvious difficulty of tracing descent and relationship of deceased members of families by any other evidence. And it is upon this ground that the declarations of deceased parents are received relative to the legitimacy of children,[2] and general reputation, in this respect, in the neighborhood, has been held admissible; but the value of such evidence will depend upon the circumstances of each case,[3] made of course "*ante litem motam.*"[4] The general reputation of a family, proved by a surviving member of it; entries contained in books, such as family bibles, if produced from the proper custody, even although there be no evidence of the handwriting or authorship of such entries;[5] correspondence between relatives; recitals in deeds; descriptions in wills; inscriptions on tombstones, rings, monuments, or coffin plates; charts of pedigrees, made or adopted by deceased members of the family, etc., have

[1] Kaywood v. Barnett, 3 Dev. & B. (N. C.) L. 91; Elliott v. Piersall, 1 Pet. (U. S.) 328; Jackson v. Cooley, 8 John. (N. Y.) 128; Waldron v. Tuttle, 4 N. H. 371; Kelly v. McGuire, 15 Ark. 555; Crawford v. Blackburn, 17 Md. 49; Copes v. Pearce, 7 Gill (Md.) 247.

[2] Jewell v. Jewell, 17 Pet. (U. S.) 213; S. C., 1 How. (U. S.) 219, Gaines v. New Orleans, 6 Wall. (U. S.) 642.

[3] Gaines v. New Orleans, *ante.*

[4] Davis v. Moyles, 76 Vt. 25, 56 A. 174, 178. See 1 Phill. Ev. 206, 10th ed.; Gee v. Ward, 7 E. & B. 509.

[5] Hubbard v. Lees, L. Rep., 1 Ex. 255, 258.

severally been held receivable in evidence for this purpose.[6] And it is impossible to dispense with this kind of evidence, *especially in proof of remote and collateral matters*;[7] but great care should be observed when the actual point in issue in a cause depends wholly or chiefly upon it. It is, from its nature, very much exposed to fraud and fabrication; and even assuming the declaration, inscription, etc., correctly reported by the medium of evidence used, many instances have been shown how erroneous is the assumption that all the members of a family, especially in the inferior walks of life, are even tolerably conversant with the particulars of its pedigree.[8]

Sec. 82. Evidence should come from Member of Family or Undoubted Source.

The evidence should come from some one connected with the family whose pedigree or relationship to a deceased person is sought to be established by blood, or from some one who has some personal knowledge of the family, or the facts of which they speak, or those who have derived knowledge relative thereto from persons connected with the family, or those particularly acquainted therewith, or the evidence will not be received;[1] as to prove who are heirs of a deceased person;[2] so, to prove who was the mother of a child, the declarations of a father in reference thereto may be received;[3] so the declaration of any deceased person, as to who were his or her heirs;[4] so to prove the death of a person after the lapse

[6] In a suit in which the plaintiff alleged that he was the natural son of A., a declaration by a deceased brother of A. that the plaintiff was A.'s natural son, was held to be inadmissible. Crispin v. Doglioni, 32 L. J., P. & M. 109.

[7] Hearsay is admissible to prove a matter of pedigree collaterally in issue. North Brookfield v. Warren, 16 Gray (Mass.) 171.

[8] See the judgment of the master of the rolls in Crouch v. Hooper, 16 Beav. 182.

[1] Carter v. Buchanan, 9 Ga. 539; Jackson v. Browner, 18 Johns. (N. Y.) 37; Moers v. Bunker, 29 N. H. 420; Strickland v. Poole, 1 Dallas (U. S.), 14; Kelly v. McGuire, 15 Ark. 555; Greenwood v. Spiller, 3 Ill. 502; Armstrong v. McDonald, 10 Barb. (N. Y.) 300; Binney v. Ham. 3 A. K. Marsh. (Ky.) 322; Crawford v. Blackburn, 17 Md. 49; Kaywood v. Barnett, 3 Dev. & B. (N. C.) 91; Chapman v. Chapman, 2 Conn. 347; Everingham v. Mesroom, 2 Brev. (S. C.) 461; Gilchrist v. Martin, 1 Bailey (S. C.), 492; Webb v. Richardson, 42 Vt. 465; Jackson v. Cooley, 8 Johns. (N. Y.) 128; Elliott v. Piersoll, 1 Pet. (U. S.) 328; Waldron v. Tuttle, 4 N. H. 371; Stein v. Bowman, 13 Pet. (U. S.) 209.

[2] Greenwood v. Spiller, 3 Ill. 502.

[3] United States v. Saunders, 1 Hempst. (Tenn.) 483.

[4] Moffit v. Witherspoon, 10 Ired. (N. C.) 185.

of a long time, in which he has not been heard from.[5] But this species of evidence, coming from living persons connected with the person deceased, and the declarations of such deceased persons, are entitled to more weight than those coming from persons who had no connection with the family.[6] And all such evidence is to be weighed in view of the circumstances under which the declarations were made, whether any litigation had been commenced involving the relationship, and all the circumstances calculated to throw any light upon the motives or interest of the person in making them.[7] Before the declarations of a deceased person can be admitted in cases of pedigree the relation of the declarant to the family must be established by other testimony.[8] But where the membership is as difficult to prove as the fact in controversy slight proof of it will be sufficient; so in a recent case in New York where one of the parties claimed title through a deed dated 1817, which recited that the grantors were the sole heirs of a former owner, it was held that the identity of the family name, the certificate of acknowledgment and the custody by the proper party of the deeds showing title in the prior owner, in view of the lapse of time, were sufficient to show membership of the grantors in the family. The grantors were presumed to be dead in view of the lapse of time.[9] Testimony of a general report of the death of a party is admissible to prove his death only when brought to the knowledge of his family.[10]

The reason for the rule admitting hearsay evidence in matters of pedigree is that the evidence is based on information received in the family. So where a mother testifies as to the age of her deceased son declarations by him and his deceased father contradicting the testimony of the mother may be admitted.[11] Thus a witness may testify to his own age even though all he knew about his age is what his mother told him and she was then living in the county where the trial took place.[12] A witness has been

[5] Miner v. Boneham, 15 Johns. (N. Y.) 226; Stouvenel v. Stevens, 2 Daly (N. Y. C. P.), 319.

[6] Saunders v. Fuller, 4 Humph. (Tenn.) 516.

[7] United States v. Saunders, 1 Hempst. (Tenn.) 483; Canjolle v. Ferrie, 2 Barb. (N. Y.) 177.

[8] Estate of Williams. 128 Cal. 552, 61 P. 670, 79 Am. St. Rep. 67.

[9] Young v. Shulenburg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730.

[10] Welch v. New York &c. Railroad, 182 Mass. 84, 91; 64 N. E. R. 695.

[11] Travellers' Insurance Co. v. Henderson Cotton Mills, (Ky., 1905), 985 S. W. 1090.

[12] McCollum v. State, 118 Ga. 308, 46 S. E. 413.

allowed to testify to the approximate age of his elder brother, the court saying that such testimony depended on knowledge acquired by observation rather than hearsay.[13] A wife was held competent to testify as to her husband's age when she had lived with him for twenty years and with his parents although she testified that the only information she had on the subject was gained from the announcement of the priest at the time of her marriage and that she had never talked with her husband about his age. The court says that, notwithstanding her testimony, in view of the length of time of her membership in the family it is scarcely believable that she was not only presumptively but actually acquainted with the exact age of her deceased husband and of the family tradition.[14]

So, too, in questions of pedigree the declarations of deceased members of a family in reference to marriages are admissible; but when the marriage is essential to be established as a substantive fact, it cannot be established by such declarations.[15] The declarations of deceased parents are proper evidence of the parentage of the children.[16] The date of the birth of a child may be proved by the declarations of deceased members of the family, even though there is a family register in which the birth of the child is registered. The reason for this rule is, that both species of evidence are of equal weight and character, the one not being entitled to any more consideration than the other.[17] But the *place* of its

[13] Hancock v. Supreme Council Catholic Benevolent Union, 69 N. J. 308, 55 A. 246.

[14] Grand Lodge A. O. W. v. Bartes, (Neb., 1904), 98 N. W. 715, reversing S. C. 96 N. W. 186.

The rule in reference to this class of evidence was given by the court in a case in the United State Supreme Court. Stein v. Bowman, 13 Pet. (U. S.) 209, thus: "The hearsay evidence admissible in cases of pedigree is limited to those connected with the family who are supposed to have known the relationship existing, and must have been made before the suit was commenced." In a New York case, Jackson v. Browner, 18 Johns. (N. Y.) 37, it was held that "where the witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what they have heard or understood, such evidence is insufficient to establish pedigree." In another case, Elliot v. Piersoll, 1 Pet. (U. S.) 328, where a letter from a deceased member of a family, stating the pedigree of the family, sworn to by the wife as having been written by her husband, and as containing facts of which he had often spoken to her in his life-time, was offered, it was held that both the letter and the testimony of the wife were competent evidence.

[15] Westfield v. Warren, 8 N. J. L. 249.

[16] Chilvers v. Race, 196 Ill. 71, 63 N. E. R. 701.

[17] Clements v. Hunt, 1 Jones (N. C.), 400.

birth[19] cannot be established in this way; or any fact that is susceptible of proof by witnesses who speak from their own knowledge.[20] In questions of age and pedigree the reports of the boards of health and census reports are admissible.[21]

The hearsay must be from persons having such a connection by blood or marriage with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and are not mistaken.[22] Declarations by a deceased person as to her own legitimacy are evidence.[23] So by a deceased husband as to the legitimacy of his wife, and as to the pedigree of her family, are evidence.[24] So the declaration of a wife, as to her husband's family;[25] but not the declarations of her father, nor the declarations of illegitimate relations.[26] The declarations of servants and intimate acquaintances are not admissible.[27] The declarations of a deceased person as to the fact of his own marriage are evidence.[28] The declarations of a deceased mother as to the non-access of her husband are not evidence, on grounds of policy.[29] But where the non-access is admitted or established, her declarations may be proof of paternity.[30] Before any such declaration can be admitted in evidence, the relationship of the declarant by blood or marriage must be established by some proof independent of the declaration itself. It is the duty of the judge to decide whether this relationship is proved; slight evidence will, however, be sufficient.[31] Old depositions in a suit, purporting on the face of them to be made by relations, but not proved *aliunde* to have been so made, are evidence,[32] the antiquity of the depositions dispensing with such extrinsic proof.

Although it is necessary to give evidence *dehors* to connect the

[19] Wilmington v. Burlington, 4 Pick. (Mass.) 174; Shearer v. Clay, 1 Lit. (Ky.) 260; Independence v. Pompton, 4 Halst. (N. J.) 209; Brooks v. Clay, 3 A. K. Marsh. (Ky.) 545.

[20] Mima Queen v. Hepburn, 7 Cranch (U. S.), 290.

[21] Murray v. Supreme Hive L. M. of W., 112 Tenn. 664, 80 S. W. 827.

[22] Whitelocke v. Baker, 13 Ves. 514.

[23] Procur.-Gen. v. Williams, 31 L. J., P. M. & A. 157.

[24] Vowles v. Young, 13 Ves. 148; Doe *d.* Northey v. Harvey, Ry. & M. 297.

[25] Shrewsbury Peerage, 7 H. L. C. 1.

[26] Bamford v. Barton, 2 M. & Rob. 28; Crispin v. Doglioni, 3 Sw. & Tr. 44; 32 L. J., P. M. & A. 109.

[27] Johnson v. Lawson, 2 Bing. 86; S. C., 9 B. Moore, 183.

[28] B. N. P. 112; R. v. Bramley, 6 T. R. 330.

[29] R. v. Luffe, 8 East, 193; Goodright v. Moss, Cowp. 594.

[30] Legge v. Edmonds, 25 L. J. Ch. 125.

[31] Plant v. Taylor, 7 H. & N. 237; 31 L. J. Ex. 289; Smith v. Tebbitt, L. R., 1 P. & M. 354.

[32] Freeman v. Phillipps, 4 M. & S. 486.

persons making them with the family, yet where the question is whether A. be related to C., the declarations of B., who is proved to have been related to A., are evidence to prove C. related to A., without evidence *dehors* to show B. related to C.[33] When the judge has decided that the evidence is sufficient, he may receive the declaration, although the fact of relationship is the very point in issue in the case,[34] and he is not bound to hear evidence on the *voir dire* to rebut the evidence of relationship.[35] It is no objection that the person who made the declaration stood in *pari casu* with the person tendering it in evidence.[36] In a claim of peerage a widow was admitted to prove the declarations of her deceased husband in support of her son's title, though the husband, if living, would have had the right which the declarations went to establish.[37] So declarations are admissible, though they tend to show the declarant's own title at the time, provided there was no *lis mota*.[38] The relative, whose declarations are offered, must be proved to be dead, before they can be admitted in evidence, unless, indeed, from the circumstances, his death may be presumed.[39]

Sec. 83. What is Pedigree.

Hearsay evidence is admissible in some States to prove the marriage of parties by proving cohabitation.[1] So it is competent to prove, by the declaration of the parents of a child, whether they were married when the child was born; but such evidence is not admissible to prove that children born in wedlock are illegitimate by reason of non-access,[2] so such evidence is admissible to prove whom a man married, or whom a woman married, what children they had, whether legitimate or illegitimate, that either died abroad; and these facts may be established by the declarations of deceased members of the family; but the declarations of those

[33] Monkton v. Att.-Gen. 2 Russ. & Myl. 156.

[34] Jenkins v. Davies, 10 Q. B. 314.

[35] Hitchins v. Eardley, L. R., 2 P. & M. 248.

[36] Monkton v. Att.-Gen., 2 Russ & Myl. 159.

[37] Cited by Abbott, C. J., in Doe *d.* Tilman v. Tarver, Ry. & M. 141.

[38] Jenkins v. Davies, *supra*. But in Plant v. Taylor, *ante*, it was doubted whether a declaration by a person obviously in his own interest ought to be received. A deposition of a deceased relative, taken on a commission of inquiry as to the next of kin of a lunatic, is admissible to establish the title of the lunatic's heir at law. Gee v. Ward, 7 E. & B. 509.

[39] Butler v. Mountgarret, 7 H. L. C. 633.

[1] O'Gara v. Eisenlohr, 38 N. Y. 296.

[2] Stevens v. Moss, Cowper, 491; Bowles v. Bingham, 2 Munf. (Va.) 442.

not connected with the family (as neighbors or acquaintances) are not receivable.[3]

A statement as to pedigree is admissible to prove a negative as well as a positive fact. So, where a woman deposits funds in a bank "in trust for son Thomas" it was held in an action by her administrator to recover the deposit that statements by her during her lifetime to the effect that she had no children were admissible.[4] Although the term pedigree includes the facts of birth, marriage and death, and the time when these events happened, these several facts or either of them do do not of themselves constitute pedigree, so the age of the prosecutrix in a prosecution for rape is not a question of pedigree.[5] It has been held that the pedigree of an animal may be proved by reputation.[6]

Sec. 84. Old Documents, Inscriptions, Etc., Admissible to Establish.

So in such cases recitals in old deeds are evidence;[1] inscriptions on old gravestones, the finding of a special verdict between other members of the family stating a pedigree, the statement of a pedigree in an old bill in chancery, as well as herald books and entries in family bibles;[2] but, so far as the allegations in a bill in chancery are concerned, it is proper to say that generally, under the modern rules of evidence, such evidence is not regarded as admissible; but if the circumstances, the relations of the parties and the nature of the issue are such as to afford no ground for supposing that the orator's mind had any bias, and that, so far as these facts are concerned, he had no interest to serve, there can be no question but that the evidence would be received for what it was

[3] Vowles v. Young, 13 Ves. Jr. 140; Whitlock v. Baker, id. 511.

[4] Washington v. Bank for Savings, etc., 171 N. Y. 166, 63 N. E. 831, 89 Am. St. Rep. 800.

[5] People v. Mayne, 118 Cal. 517, 50 P. 654, 62 Am. St. Rep. 256.

[6] Jones v. Memphis & A. C. Packet Co. (Miss., 1902), 31 So. 201.

[1] Little v. Palister, 4 Me. 209; Buller's Nisi Prius, 233, 294; Morris v. Vandever, 1 Dal. (U. S.) 67; Paxton v. Price, 1 Yeates (Penn.), 500. A recital of descent by a relative in a deed is admissible in evidence: King v. Hyatt, 51 Kan. 504, 32 P. 1105, 37 Am. St. Rep. 304. Where possession has been held under ancient deeds recitals of descent in the deeds are evidence of the descent as there stated. Wilson v. Braden (W. Va., 1904), 49 S. E. 409.

[2] Curtis v. Patton, 6 S. & R. (Penn.) 135; Kidney v. Cockburn, 2 R. & M. 163; Taylor v. Cole, 7 T. R. 3; Lovell v. Arnold, 2 Munf. (Va.) 167; Pegram v. Jabell, 2 Harr. & Munf. (Va.) 281; Whittuck v. Waters, 4 C. & P. 376; Goodright v. Moss, 2 Cowp. 594.

worth in the establishment of a pedigree.[3] So statements in old wills bearing upon questions of pedigree or relationship, although the will is canceled, and never was operative, but which was found among the papers of the testator, a deceased member of the family, whose pedigree are in question, are admissible.[4] So a register of births and marriages kept in the records of a town is admissible on questions of pedigree.[5] So *ex parte* affidavits taken abroad have been held admissible to prove pedigree, and to establish boundaries; also to establish the identity of a person.[6] So depositions of deceased witnesses, used in a cause between other parties, are admissible upon a question of pedigree, whether taken before or after the litigation commenced in which the question of pedigree is involved.[7] Inscriptions upon rings worn by a former member of the family are held admissible to prove pedigree.[8]

Lord Erskine, in commenting upon the class of evidence competent to prove a pedigree, said: "Upon questions of pedigree, inscriptions upon tombstones are admitted, as it must be supposed that the relations of a family would not permit an inscription without foundation to remain. So engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it." Charts of pedigree hung up in a family mansion, or in a situation to indicate that it was recognized and accepted by the family as correct;[9] coat armor,[10] and *mural inscriptions,* giving an historical account of a family, placed in a chancel which was formerly used as a burial place for the family, located in a parish where the family were long resident proprietors, have been also held admissible; and where the articles themselves cannot be produced, copies thereof may be used.[11] In this case, which involved a question of pedigree, the existence of the mural inscriptions and their obliteration, about twenty-four years before the trial, was established; and the court held that a

[3] Berkley's Peerage Case, 2 Bing. 86.

[4] Johnson v. Earl Pembroke, 11 East, 503.

[5] Miner v. Boneham, 15 Johns. (N. Y.) 226. See § 196, *post.*

[6] Taylor v. Simpson, 2 Dall. (U. S.) 117; Sturgeon v. Waugh, 2 Yeates (Penn.), 467; Lilly v. Kintzmiller, 1 id. 28.

[7] Peake's Ev. 24, note, citing MS. case of Bordereau v. Montgomery; Jenkins v. Tom. et al., Wash. (U. S.) 123; Lovell v. Arnold, 2 Munf. (Va.) 167.

[8] Vowles v. Young, 13 Ves. 144.

[9] Goodright v. Moss, 2 Cowper, 594.

[10] Cooke's Littleton, 27 *a.*

[11] Slaney v. Ward, 1 My. & Cr. 354.

copy thereof was competent evidence, provided the genuineness of the original inscriptions was established. This class of evidence, however, may always be impeached, and Mr. PHILLIPS, in vol. 1, p. 222 of his work on Evidence, gives several instances in which that species of evidence has been completely overthrown. None of this species of evidence is conclusive, but its genuineness and the weight to be given it depend largely upon the circumstances of each case, the condition in which it was found, and a multitude of circumstances that tend to convince the mind that a thing is real or spurious, in reference to which no rules can be given.

So it may be said, generally, that any species of evidence tending to show the declarations of deceased relatives upon the question of relationship, which is established as genuine, and which leaves no doubt as to their understanding of the matter, is always admissible to establish pedigree. The register of births, deaths or marriages, in a family bible,[12] to which all the family has access, gives it that validity which it would not have if the book remained in the exclusive possession of the father. Entries in family bibles have, therefore, become common evidence of pedigree where there is no register of births or baptism, or entries in the diary of a physician who was present at the birth of a child.[13] So, memoranda in other books, as an almanac,[14] a prayer book,[15] as well as entries in any other documents, books or papers, kept in and accessible to the family, are admissible.

Declarations in a family, descriptions in wills, inscriptions upon monuments, in bibles or other books, and in registry books, are all admitted, upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion where the mind stands in an even position, without any temptation to exceed or fall short of it.[16]

[12] Leggett v. Boyd, 3 Wend. (N. Y.) 376; Goodright v. Moss, Cowp. 594; Whitlock v. Baker, 13 Vesey, 511; Higham v. Ridgway, 10 East, 120.

[13] Ames v. Middleton, 23 Barb. (N. Y.) 571.

[14] Herbert v. Tucknall, L. Raym. 84.

[15] Leigh's Peerage, printed in 1829, p. 310.

[16] *Per* Lord ELDON, Whitelocke v. Baker, 13 Ves. 514; Higham v. Ridgway, 10 East, 109; Berkley Peerage Case, 4 Camp. 418. And see the Slane Peerage Case, 5 Cl. & F. 23; and the Vaux Peerage, ib. 526.

Sec. 85. Entries in Family Bibles, and other Family Records.

Entries in a family bible are admissible in evidence, on the ground that being in that place, they are to be taken as assented to by those having the custody of the book; proof of the handwriting of the entries is therefore immaterial.[1] But a record made in a family bible is hearsay evidence and not admissible where the person making the record is alive and can be examined.[2] It seems, however, that in the case of any other book the entries must be proved to have been made by a member of the family;[3] or that they have been treated by a relative as a correct family memorial.[4] A pedigree which has long hung up in a family mansion is good evidence in such cases;[5] or a marriage certificate kept by the family.[6] A minute-book of a visitation, signed by the heads of the family, has been admitted, though produced from a private library.[7] A signed pedigree, delivered to the Herald's College, by virtue of a commission under which the college was authorized to receive and enroll such pedigrees was admitted.[8] So, a paper in the handwriting of a deceased member of the family, purporting to give a genealogical account of the family, was held admissible, though never made public by the writer, erroneous in many particulars, and professing to be founded *partly* on hearsay.[9] So, a ring, worn publicly, stating the date of the person's death whose name is engaved upon it. So, a description of a party as "daughter and heir," in a deed signed by the party so described.[10]

[1] Hubbard v. Lees, L. R., 1 Ex. 255. An entry made in a family bible is admissible in evidence on a question of pedigree although the entry was not made by a member of the family. The admissibility of an entry in a family bible does not depend upon the handwriting or authorship of the entry, but upon the fact that it is in the family bible. It is of the nature of a record, and, being produced from the proper custody, is itself evidence. The reason why it is admissible, although the handwriting be unknown or made by others than the family, is simply because the bible being in the family, where all have access to it, the presumption is that the entry would not be permitted to remain if the whole family did not adopt it, and thereby give authenticity to it. Union Central Life Insurance Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715. See, also, Berkley Peerage Case, 4 Champ. 421 *per* Lords Ellenborough and Redesdale.

[2] People v. Mayne, 118 Cal. 517, 50 P. 654, 62 Am. St. Rep. 256.

[3] Tracy Peerage, Hubback Evid. of Succession, 673.

[4] Hood v. Beauchamp, 8 Sim. 29.

[5] Goodright v. Moss, Cowp. 594.

[6] Jenkins v. Davies, 10 Q. B. 314.

[7] Pitton v. Walker, 1 Stra. 162.

[8] Shrewsbury Peerage Case, 7 H. L. C. 19.

[9] Monkton v. Att.-Gen., 2 Russ. & My. 147.

[10] Jenkins v. Davies, *supra;* Smith v. Tebbitt, L. R., 1 P. & M. 354.

But an old pedigree, professing on the face of it to be compiled from "registers, wills, monumental inscriptions, family records and history," and going back to a fabulous date, is not evidence, though proved to be signed by members of the family, except so far as it relates to persons presumably known to them, or respecting whom they may have obtained information from other members of the family. Whether the *mere recognition* of a pedigree by a deceased ancestor will make it legitimate evidence (except against claimants under him), is doubtful.[11] The ground upon which the inscription on a tombstone, or a tablet in a church, is admitted is, that it is presumed to have been put there by a member of the family cognizant of the facts, and whose declaration would be evidence.[12] And on the issue of the age of a person a witness may testify to his recollection of an inscription on a tombstone, although such evidence is open, of course, to impeachment or contradiction, even though the inscription is not shown to have been made by or under the direction of a deceased relative if it has been publicly exhibited. It is presumed that a relative of a family would not permit an erroneous inscription to remain.[13] The memoranda of a parent are good evidence to prove the *time* of the birth of a child.[14]

Sec. 86. Declarations of Deceased Persons.

But the declaration of a father as to the *place* of birth of a son was considered inadmissible, as being a mere question of locality, and not of pedigree.[1] An inscription on a tombstone, stating the

[11] Davies v. Lowndes, 6 M. & G. R. 471.

[12] PARKE, B., in Davies v. Lowndes, 512.

[13] Boyett v. State, 130 Ala. 77, 30 S. 475, 89 Am. St. Rep. 19.

[14] Herbert v. Tuckal, T. Raym. 84; Brune v. Rawlings, 7 East, 290.

[1] R. v. Erith, 8 East, 542. So, in Shields v. Boucher, 1 De G. & Sm. 40, WILDE, C. J., rejected, upon the trial of an issue, declarations of a relation as to the part of England from which he had originally come; but on moving for a new trial, KNIGHT-BRUCE, V.-C., expressed a strong opinion in favor of their admissibility in a case of mere genealogy, and with a view to identify ancestors, and distinguished R. v. Erith, *supra*. *Accord, per* KINDERSLEY, V.-C., in Bauer v. Mitford, 7 W. R. 570, June, 1859; and declarations of a party, showing that he has or had relations living at A., have been admitted to identify persons whose existence is proved *aliunde*. Rishton v. Nesbitt, 2 M. & Rob. 554; Hood v. Beauchamp, Hubback Evid. of Succession, 468, cited 1 Tayl. Evid., § 582. The declarations of a party as to *his own* illegitimacy, or place of birth, seem inadmissible except against himself, or those claiming under him by title posterior to the declaration. R. v. Rishworth, 2 Q. B. 476.

death of a party at the age of 90, was admitted as evidence of the age.[2] So, an old tracing from an effaced monument has been admitted;[3] a bill in chancery by a father, stating his pedigree.[4] An *answer* in chancery, sworn *ante litam motam,* seems unexceptionable as evidence of pedigree incidentally set forth in it.[5] The recital in a family conveyance by a trustee is evidence of parentage.[6] So an old and cancelled will has been allowed as evidence of the existence and relative ages of certain deceased members of the family from whom both parties derived title.[7] The probate of a will is not *primary* evidence for this purpose.[8] The will itself and signature of the testator must be proved, unless the age of the document or other circumstances dispense with such proof; it is said, however, that the "ledger book" or "original rolls" of the Ecclesiastical Court, containing an enrollment of the will, are admissible evidence to prove relationship.[9] It is not necessary that the declarations should be contemporaneous with the facts declared; thus a person's declaration, that his grandmother's maiden name was A. B. is admissible.[10] Nor is it necessary that the fact declared should be in the personal knowledge of the declarant; thus the declaration of A. as to what he heard from B. is admissible, if both be relations.[11] *Declarations of the kind above described are strictly admissible only in inquiries relating to descent or relationship, or in tracing the devolution of property.* In proving recent events, such as the place of birth, age, death, etc., of a person, where that fact is directly in issue, stricter proof may be reasonably required. General reputation is good evidence in pedigree cases, as of heirship,[12] or marriage;[13] but if it appears on cross-examination or otherwise that the witness is speaking of evidence given him by some individual, even as to general reputation, the evidence ceases to be admissible.[14]

[2] Rider v. Malbone, *cor.* Littledale, J., cited id., pp. 169, 170.

[3] Slaney v. Wade, 7 Sim. 595.

[4] Taylor v. Cole, 7 T. R. 3, n. But this is contrary to the resolution of the judges in the Banbury Peerage Case, 2 Selw. N. P., 2nd ed. 773, and to Boileau v. Rutlin, 2 Exch. 678.

[5] In the Wharton Peerage Case, 12 Cl. & Fin. 295, an answer, sworn but not filed, was rejected as evidence of pedigree.

[6] Slaney v. Wade, *supra.*

[7] Johnson v. Earl of Pembroke, 11 East, 504.

[8] Wilde v. Ormerod, 1 M. & Robb. 466; Dike v. Polhill, Ld. Raym. 744.

[9] B. N. P. 246.

[10] Lord Brougham, C., Monkton v. Att.-Gen., 2 Russ. & My. 158.

[11] Id. 162.

[12] Bridger v. Huett, 2 F. & F. 35.

[13] Evans v. Morgan, 2 C. & J. 453; Shedden v. Patrick, 2 Sw. & Tr. 170; 30 L. J., P. M. & A. 217; Campbell v. Campbell, L. R., 1 H. L. Sc. 201.

[14] Shedden v. Patrick, *supra.*

CHAPTER VII.

Hearsay.—Ancient Possessions.

Section 87. Hearsay admissible to prove, when.
88. Hearsay not admissible to prove private title.
89. Perambulations.
90. Old documents.
91. Manorial documents.
92. Maps.
93. Verdicts, etc.
94. Judgments, decrees and orders.
95. Grounds upon which these rules are founded.
96. Position of parties presumed to be as stated in ancient documents.
97. Proof of modern exercise of right.

Sec. 87. Hearsay Admissible to prove, when.

Upon the same principle and for the same reasons that hearsay evidence is admitted upon questions of pedigree, are ancient documents admitted upon questions of ancient possessions and in support of them, and instruments which are more than thirty years old are treated as ancient documents, and when there is nothing suspicious about them, they are presumed to be genuine without express proof, the witnesses being presumed to be dead, and when they are found in the proper custody, and are corroborated by possession under them, they prove themselves.[1]

Ancient documents, purporting to be a part of transactions, and not a mere narrative of them,[2] are, under certain qualificat-

[1] Hedger v. Ward, 15 B. Mon. (Ky.) 106; Doe v. Roe, 31 Ga. 593; Carter v. Chandron, 21 Ala. 72; Doe v. Eslaver, 11 id. 1028; Beall v. Deering, 7 id. 124. It is an established rule of evidence that a deed more than thirty years old may be given in evidence, without proof of its execution, when found in the possession of the party claiming under it, and the possession of the thing conveyed has followed the conveyance. Stockbridge v. West Stockbridge, 14 Mass. 257; Winston v. Guathmey, 8 B. Mon. (Ky.) 19; Crane v. Marshall, 16 Me. 27; Hall v. Gittings, 2 Har. & J. (Md.) 380; Green v. Chelsea, 24 Pick. (Mass.) 71; Jackson v. Blanshaw, 3 Johns. (N. Y.) 292; Troup v. Hurlbut, 10 Barb. (N. Y.) 354; Clark v. Wood, 34 N. H. 447; Zeigler v. Houtz, 1 Watts & S. (Pa.) 533; Duncan v. Beard, 2 Nott & M. (S. C.) 400.

[2] Davis v. Moyles, 76 Vt. 25, 56 A. 174, 178.

Thus, upon a question as to the right of a lord of a manor to hold certain land within the manor free from common, several counterparts of leases found among the muniments of the lord of the manor, from

ions, which will be noticed, receivable as evidence that those transactions really occurred. And, in this sense, the documents may be called hearsay evidence of ancient possession. Such evidence is very commonly adduced in practice to corroborate modern use or possession. Rent rolls, where payments have been made, are good evidence to prove fee-farm rents,[3] or for other purposes.[4] Old court rolls have been admitted to prove a prescriptive right to wreck in the lord of a manor.[5] It has been questioned, however, whether

which it appeared that the land had been demised by the lord free from common, were held to be receivable in evidence. Clarkson v. Woodhouse, 5 T. R. 413, n.; S. C., 3 Doug. 189. See, also, Barnes v. Mawson, 1 M. & S. 78, *supra;* Leathes v. Newit, 4 Price, 355; 8 Price, 562; Fisher v. Graves, 3 Eag. & Y. 1180. To show the practical location of a boundary line and acquiescence in it, between the town of Rochester and the Hardenburgh patent, a line some fifteen miles long, ancient deeds and agreements between parties interested in the line, and statements in the town records of Rochester, are competent evidence, if made *ante litem motam.* Under the same limitations, a survey of the line and an agreement to abide by it, adhered to for many years, though not legally binding upon the parties, are competent evidence to establish the line thus agreed upon. Hunt v. Johnson, 19 N. Y. 279.

The authority of an ancient deed is not established by producing it from the proper custody and showing it to have existed for even sixty years, unless it be also shown that possession has been taken or some unequivocal act done under it, or that its validity has been admitted by parties having an adverse interest. Wilson v. Betts, 4 Den. (N. Y.) 201. Thirty years' uninterrupted possession under a deed will entitle it to be read in evidence without proving its execution. Clark v. Owens, 18 N. Y. 434.

In an action of trespass, Rogers v. Allen, 1 Camp. 309, upon issue joined on a plea of justification by virtue of a prescriptive right of fishery appurtenant to a manor, old licenses on the court rolls, and leases granted by the lords of the manor, in consideration of certain rents, to fish in the *locus in quo,* were held to be receivable evidence. HEATH, J., in this case, observed that he could not distinguish the licenses from old leases, which were always received in evidence in favor of those claiming under the lessors.

[3] Newburgh v. Newburgh, 12 Vin. Ab. T, b. 43.

[4] Woodnorth v. Cobham, 1 Eag. & Y. 802. In 12 Vin. Ab. A, b. 66, it is said, a rental is but weak evidence, unless payment is also proved, and not sufficient *per se;* and by Comyns, B., 12 Vin. Ab. 90, pl. 14, rentals without money received and paid upon them, are nothing. In Lancum v. Lovell, 6 C. & P. 441, an ancient counterpart of feoffment produced from corporation muniments was rejected, because no rent had been received in respect of the property.

[5] Biddulph v. Ather, 2 Wils. 23.

In Clarkson v. Woodhouse, 5 T. R. 413, n. Parochial descriptions in leases are evidence upon questions of public right, where reputation is admissible. Plaxton v. Dare, 10 B. & C. 17, Lord MANSFIELD, C. J., said that the case before him differed from the case of Lord Pimfret v. Smith, 6 Bro. B. C. 440, where Lord Pomfret offered a lease by himself or his predecessor, describing the premises in dispute as lying within the limits of Lord Pomfret's estate, the question being on the boundaries. But on reference to the report of that case, it would seem that no part of the lease, upon the admissibility of which the principal question arose,

ancient leases are proper evidence against strangers, of the boundary of the property conveyed.

An old map of lands annexed to a deed seems to stand on the same footing as a description contained in the deed itself, and to be admissible in evidence where it is part of the act by which property is to be conveyed.[6] But where a map or survey is not connected with any act of ownership, it appears to be inadmissible evidence to prove the parcels of an estate, at least so far as respects the principle of evidence under consideration.[7]

But the mere existence of a deed for more than thirty years, without any proof of accompanying possession, is not enough in any case to authorize it to be read in evidence as an ancient deed, without proof of its execution.[8]

applied to the place in dispute, but only the words of an exception contained in it, and therefore it was contended that the lease, not containing a demise of the lands in question, was not evidence of an act of ownership, but only showed that the lands were excepted by a description injurious to the rights of a stranger, against whom that description was attempted to be used.

[6] Gilb. on Ev. (3d ed.) 78, citing Yeates v. Connop. Hil. Ass. 1702. See, also, 1 Stra. 95, n.; 4 N. & M. 302; 1 Lord Raym. 734; Hughes v. Lakin, 7 C. & P. 481; Wakeman v. West, 7 C. & P. 479; Jackson v. Marsh, 6 Cow. 281; Hathaway v. Power, 6 Hill, 453.

[7] Anon., 1 Stra., 95; Bridgman v. Jennings, 1 Lord Raym. 734; B. N. P. 283; by Lord KENYON, C. J., in Pollard v. Scott, Peake, 18. See Wakeman v. West, 7 C. & P. 479; Doe v. Seaton, 4 N. & M. 81; Donnison v. Elsley, 2 Eag. & Young, 1396, n.; 12 Vin. Ab. 90, pl. 12.

[8] Ridgeley v. Johnson, 11 Barb. (N. Y.) 527; Homer v. Cilley, 14 N. H. 85; Bank of Middlebury v. Rutland, 33 Vt. 414; Dishager v. Maitland, 12 Leigh (Va.), 524; Fairly v. Fairly, 38 Miss. 280; Guinor v. Cotton, 49 Tex. 101; Johnson v. Simmons, 50 Tex. 521; Middleton v. Mass, 2 N. & McCord (S. C.), 55; Blakeman v. Doughty, 40 N. J. L. 319. In Martin v. Rector, 24 Hun (N. Y.), 27, upon the trial of an action of ejectment, the plaintiff produced two leases sixty years old. A witness testified that the subscribing witnesses were dead, and that from an inspection of many similar leases he was familiar with their signatures, and believed them genuine; that the lessor was dead; that he had seen him write, and believed *his* signature genuine. It was held that in the absence of proof of possession under the leases, *or as to their custody*, they were not admissible. In Missouri, by statute, proof of the execution of a deed, where the record is thirty years old, is dispensed with, but it is held that this does not dispense with the necessity of proving the loss of the deed before *a copy* of the deed can be used. Crisper v. Hannavan, 72 Mo. 548. The principle which allows ancient deeds, under certain circumstances, to prove themselves, has no application to cases in which the deed does not appear upon its face to have been regularly made, and in form sufficient for the object for which it is set up. Reaume v. Chambers, 22 Mo. 36. Thus, where the deed of a married woman is not executed in conformity with the law in force at the date of its execution, so as to convey her estate, it will not become effective as an ancient deed, from lapse of time. Boyle v. Chambers, 32 Mo. 46. Ancient records, when accompanied by

But proof of possession under the deed, even for a short time, will be sufficient. Thus, where possession for five years was proved, it was held that the deed, being more than thirty years old, was admissible in evidence as an ancient deed.[9] So, where the grantee entered upon the land believed to have been conveyed, immediately after the date of a deed more than thirty years old, though he only then occupied it for a short time, and that the grantor, twenty years after the date, acknowledged that he executed it at its date, it was held sufficient evidence of its antiquity.[10] But the fact that there has been no possession under the instrument will not defeat the admissibility of the instrument, if its authenticity is otherwise established, or such facts are shown as raise a fair presumption of its genuineness.[11] So the authenticity of an ancient instrument may be established by proving the handwriting of one of the attesting witnesses,[12] or by showing that the

an admission that they come from the proper depository, are admissible in evidence without further proof of their authenticity. A copy of an ancient proprietary charter, duly recorded and certified in the book of records of the proprietary, is admissible in evidence. Little v. Downing, 37 N. H. 355. If an instrument offered in evidence as an ancient deed be proved to be thirty years old, it is not necessary to show that it came from the proper custody, and that possession has been had under it; and if such an instrument be admitted as an ancient deed, it is admitted as being formally executed by signing, sealing and delivering. Brown v. Wood, 6 Rich. (S. C.) Eq. 155. Where a party, without objection, produces upon trial a portion of an ancient plan, the other party is entitled to put in the whole of it, as well as of the record and the deeds of those under whom he claimed, made after the partition, and referring to it. Floyd v. Tewksbury, 129 Mass. 362.

[9] Wager v. Acton, 1 Rice (S. C.), 100; Namlin v. Burwell, 75 Va. 551.

[10] Nixon v. Porter, 34 Miss. 697.

[11] Hinde v. Vattier, 1 McLean (U. S.), 110; White v. Hutchings, 40 Ala. 253; Carroll v. Norwood, 1 H. & J. (Md.) 167.

Thus a lease more than thirty years old was allowed to be read in evidence as an ancient deed, without proof of its execution, although there was no direct proof of possession accompanying it, it being found among the title papers of the estate affected by it, and the facts and circumstances in reference to the property specified in it being such as to afford a reasonable ground to presume its genuineness. Hewlett v. Cock, 7 Wend. (N. Y.) 371; Butrick, Pet'r, 185 Mass. 107, 69 N. E. 1045. In another case, Clark v. Owens, 18 N. Y. 434, a lease which was offered in evidence as an ancient deed, corresponded with one admitted by the pleadings to have been executed thirty years before, except that it was executed by A. only, while the one admitted was by A. and B. It was proved that the defendant had for four years paid rent at the time appointed in the lease; that the lease had twice been shown to him by the landlord's agent, when he had inquired as to its terms. It was held that the lease was admissible in evidence without further proof of its authenticity.

[12] Carroll v. Norwood, 1 H. & J. (Md.) 167.

instrument has been preserved under such circumstances as render it apparently authentic.[13] Thus an ancient book, kept among the records of a town, purporting to be the "selectmen's book of accounts with the treasury of the town," is admissible in evidence of the facts therein stated; and where the selectmen were at the same time assessors, an entry in such book of a credit, by an order in favor of the collector for a discount of a particular individual's taxes, was held to be evidence of an abatement of the tax of such individual.[14]

Old maps, stating boundaries made by persons having knowledge of the facts, are admissible as to the true location of the jurisdictional limits of a municipal corporation;[15] and ancient deeds and plans are admissible to prove the location of a creek or arm of the sea, filled up since the deeds were executed and the plans were made.[16] On questions as to the territorial limits of a municipal jurisdiction, either public reputation or the declarations of deceased persons, made *ante litem motam,* are admissible.[17]

The rule of evidence for ancient documents is, that *they must have the appearance of due antiquity and genuineness, and must be procured from the proper custody and be corroborated by such acts of the parties claiming under them, as correspond with their tenor.*[18] *The genuineness of these documents may generally be shown prima facie by proof that they came from the proper custody;* and as to what is the proper custody, must depend upon the circumstances of each case.

[13] Hinde v. Vattier, *ante;* King v. Little. 1 Cush. (Mass.) 436.

[14] Boston v. Weymouth, 4 Cush. (Mass.) 538.

So, in a New Hampshire case, Peterboro v. Lancaster, 14 N. H. 382, in order to show that a certain town meeting was held thirty-eight years ago, a copy of an original warrant for a town meeting in the year 1805 was produced, on which there was a seal. The town clerk, who found the original among the papers in his office, could not state that there was a seal on it when he found it, but he had recently lent it to the selectmen, and when they returned it to him there was a seal on it. The record did not show that it was sealed. Two of the signatures to it, of persons styling themselves selectmen, were proved to be genuine. The warrant was posted up, the meeting was held, and the record showed that an officer was elected and sworn. The clerk for the year 1805 was dead. It was held that from these facts, after the lapse of thirty-eight years, the jury might presume that the meeting was duly held.

[15] McCall v. United States, 1 Dak. 320.

[16] Drury v. Midland R. R. Co., 127 Mass. 571.

[17] McCall v. United States, 1 Dak. 320.

[18] Law v. Mumma, 43 Penn. St. 267.

"*Documents,*" said TINDAL, C. J., in Bishop of Meath v. Marquis of Winchester, 3 Bing. N. C. 200; Wil-

The question in all such cases is not necessarily whether it was found in the place where it would be most likely to have been found, but *whether its actual place of custody was one where it*

liams v. Conger, 49 Tex. 582, "*found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it*, for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there would never be any question as to their authenticity; but *it is when documents are found in other than their proper place of deposit*, that the investigation commences whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree, some more so, some less; and in those cases the proposition to be determined is, *whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine.* That such is the character and description of the custody which is held sufficiently genuine to render a document admissible, appears from all the cases." Clark v. Courtney, 5 Pet. (U. S.) 319; Barr v. Gratz, 4 Wheat. (U. S.) 213; Winn v. Patterson, 9 Pet. (U. S.) 663; Duncan v. Beard, 2 Nott & McC. (S. C.) 400; Wewlett v. Cook, 7 Wend. (N. Y.) 371; Jackson v. Luguere, 5 Cow. (N. Y.) 221; Jackson v. Laraway, 3 John. Cas. (N. Y.) 283. In Brown v. Wood, 6 Rich. (S. D.) Eq. 155, it was held that if a deed offered in evidence is proved to be over thirty years old, it is not necessary to prove that it came from the proper custody. But this is not the general rule. Jackson v. Miller, 6 Cow. (N. Y.) 751. Thus, in an early New York case, Jackson v. Miller, *ante*, a book, purporting to contain the proceedings of the commissioners of forfeitures, but not proved to have ever been in their possession, though found in the clerk's office in 1806, and having lain there seventeen years, is not admissible to show a sale by the commissioners; and if shown to be genuine, it would not be evidence of title.

In a Massachusetts case, Rust v. Boston Mill Corporation, 6 Pick. (Mass.) 158, in a writ of entry, upon the question whether the grantees of a cove, under whom the tenants derived their title, had ever claimed or taken possession of certain flats, the tenants were permitted to give in evidence an ancient deed, under which possession had been taken and continued to the present time, from such grantees to a third person, of a part of the flats; and an ancient record book, which, although not regularly authenticated, had been preserved among the records of the town, was held (there being nothing to impeach its veracity) competent and sufficient evidence to establish the ancient titles under the allotments from the town. In the case of deeds, grants, etc., their custody would naturally be with the grantee or those claiming under him, and when so found, they are admissible. Bullen v. Michel, 2 Price, 413; Bishop of Meach v. Marquis of Winchester, 3 Bing. N. C. 201. Where lands of individuals are bounded on town lines, ancient maps of towns made by authority of the State, and perambulations of town lines are competent evidence in suits between such individuals; and the records of a town, purporting to be made in 1728, and coming from the proper depository of such records, not attested by any clerk, and not accompanied by any notice of the town meeting, were held competent evidence to be submitted to a jury. Adams v. Stanyan, 24 N. H. 405.

might reasonably be expected to be found;[19] and the circumstance that an old lease is found in the possession of the lessor,[20] or a trust deed is found in the possession of the grantor,[21] or that an old will is found in the possession of one of the beneficiaries, when it should have been deposited in the Ecclesiastical Court,[22] has been held not sufficient to strip it of its value as evidence, as an ancient instrument. Mr. PHILLIPS, in his work on Evidence,[23] insists that in order to render ancient documents admissible, proof, if possible, must be given of some act *done with reference to them.* But this does not seem to be the rule, " for," says Mr. TAYLOR,[24] " although

[19] TINDAL, C. J., in Bishop of Meath v. Marquis of Winchester, 3 Bing. N. C. 201; Jones v. Waller, 2 Gwill. 346; Doe v. Pearce, 2 M. & Rob. 240; Rees v. Walters, 3 M. & W. 527; Doe v. Samples, 8 Ad. & El. 151; Trimlestown v. Kenns, 9 Cl. & F. 774; Bertis v. Beaumont, 2 Price, 307.

[20] Rees v. Walters, 3 M. & W. 527.

[21] Doe v. Samples, 8 Ad. & El. 151.

[22] Doe v. Pearce, 2 M. & Rob. 240.

[23] Phillips on Ev. 276.

[24] Taylor on Ev. 435.

Thus, in Rogers v. Allen, 1 Camp. 309, 311, where, in order to prove a prescriptive right of fishery as appurtenant to a manor, ancient licenses to fish in the *locus in quo*, which appeared on the court rolls, and were granted by former lords in consideration of certain rents, were tendered in evidence. Mr. Justice HEATH, after argument, held that they were admissible without any proof of the rents having been paid; but he added that, " to give them any *weight*, it must be shown that in latter times payments had been made under licenses of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in." So, in the case of the Duke of Bedford v. Lopes, cited in argument, 3 Q. B. 623, which was an action brought to try the title to the bed of a river, after proof of a grant from Henry VIII, two counterparts of leases were produced from the Duke's muniment room, comprehending the soil in question. No payment by a tenant was proved, nor any modern act of ownership; but Lord DENMAN admitted the instruments as coming from the right custody, observing that there was no circumstance in the case which threw suspicion upon them, and that " the absence of other kinds of proof was mere matter of observation." Doe v. Pullman, 3 Q. B. 622, 626. See further, on this subject, Clarkson v. Woodhouse, 5 T. R. 413, n., *per* Lord MANSFIELD; Brett v. Beales, M. & M. 418; *per* Lord TENTERDEN; Doe v. Passingham, 2 C. & P. 444, *per* BURROUGH, J.; Rancliffe v. Parkyns, 6 Dow. 202, *per* Lord ELDON; McKenire v. Fraser, 9 Ves. 5. And such also is the rule in this country. Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 283, 287; Jackson v. Luquere, 5 Cow. (N. Y.) 221, 225; Jackson v. Lamb, 7 id. 431; Barr v. Gratz, 4 Wheat. (U. S.) 213, 221; Hewlett v. Cock, 7 Wend. (N. Y.) 371, 373, 374. Again, in an action in ejectment brought by Lord Egremont, it became necessary to show that the land in question had been part of the estate of the lessor's ancestor, Sir William Wyndham; and in order to establish this fact, there was produced from the muniment room of the property which had descended from Sir William, what appeared to be a counterpart of a lease of this land, made by him; but it purported to be executed only by the lessee, and there was no proof given of actual possession under it. The Court of Queen's Bench, after consulting with some of the other

it is perfectly true that the mere production of an ancient document, unless supported by some corroborative evidence of acting under it, or of modern possession, would be entitled to little, if any, weight, still there appears to be no strict rule of law which would authorize the judge in withdrawing the deed altogether from the consideration of the jury:—in other words, *the absence of proof of possession affects merely the weight, and not the admissibility, of the instrument.*"

Under the qualifications stated, *ancient documents, purporting to be a part of the transactions to which they relate, and not a mere narrative of them, are receivable as evidence that those transactions actually occurred.* And though they are spoken of as hearsay evidence of ancient possession, and as such are said to be admitted in exception to the general rule, yet they seem rather to be parts of the *res gestae,* and therefore admissible as original evidence, on the principle already discussed. An ancient deed, by which is meant one more than thirty years old, having nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead; and, if it be found in the proper custody, and be corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of property therein mentioned, because this is the usual course of such transactions. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statue may be made out from an existing torso, or a perfect skeleton from the fossil remains of a part.[25]

Sec. 88. Hearsay not Admissible to Prove Private Title.

The objection to receiving hearsay testimony upon matters of private right, applies with great force to those cases which are unsupported by any analogy to matters of public or general interest; as where the fact sought to be proved is not matter of prescription or of boundary. Thus, in an ejectment,[1] where the

judges, held that this deed was admissible in evidence.

[25] Taylor on Ev. § 463.

[1] Didsbury v. Thomas, 14 East, 323.

lessor of the plaintiff claimed the land as tenant in tail under a will, by which the testator gave his son an estate for life, and the defendant claimed as devisee of the son, the question was, whether the land in dispute was part of the entailed estate, or had been purchased by the son. Evidence of reputation that the land had belonged to Sir J. S., and had been purchased of him by the father, the first testator, was held to be clearly inadmissible. So evidence of reputation has been rejected upon a question as to the usage in electing a schoolmaster, as it related to a private right,[2] and upon a question whether the tenants of a particular copyhold estate had the right of cutting and selling wood,[3] or whether the lord of a manor had a prescriptive right to all wreck within the boundaries of the manor.[4] In The King v. Antrobus,[5] on the trial of an information against a sheriff of a county, for not executing a convict sentenced to death, it was held that a witness could not be asked whether he had heard that it was the

[2] Withnel v. Gartham, 1 Esp. 324.

[3] Blackett v. Lowes, 2 M. & S. 494, 500.

[4] Talbit v. Lewis, 1 C., M. & R. 495.

[5] 2 Ad. & El. 749. Hearsay is admissible in the case of a custom. *Per* MARSHALL, C. J., in Mima Queen v. Hepburn, 7 Cranch, 296. A custom or usage is a fact to be proved by testimony, by persons who are acquainted with the locality or business to which it relates. Putnam v. Tillotson, 13 Met. 517; Cope v. Dodd, 13 Penn. St. 33. A present custom of business manifestly must be proved by persons engaged in or acquainted with the business. Isolated instances will not establish it, Cope v. Dodd, *supra;* there must be a general concurrence of action. Knowles v. Dow, 2 Foster (N. H.), 387. The mode of proving its existence, and the number of witnesses necessary to be called, must depend upon the circumstances of the case, Vail & Adams v. Rice, 5 N. Y. 151, and upon the object for which it is sought to be proved.

It has been said that in the case of the Bishop of Meath v. Lord Belfield, B. N. P. 295, cited by BULLER, J., in R. v. Eriswell, 3 T. R. 719; S. C., reported 1 Wils. 215, in a *quare impedit* after the plaintiff had given in evidence an entry in the register of the diocese of the institution of one K. (in which entry there was a blank where the patron's name was usually inserted), parol evidence of the general reputation of the country was offered, that K. was in by the presentation of one under whom the defendant claimed; and, on a bill of exceptions, the evidence was adjudged to be admissible, on the ground that a presentation may be by parol, and that what commences by parol may be transmitted to posterity by parol; and that this creates a general reputation. But Lord KENYON, C. J., adverting to this case in R. v. Eriswell, 3 T. R. 723 (see, also, Tellard v. Shebbeare, 2 Wils. 66), said he admitted that a presentation might be by parol, and might be proved by parol—that is, by a witness who was present and heard it; but he denied that in such a case common reputation could be given in evidence. "If it can," he added, "why might not such evidence decide titles to estates, at least before the Statute of Frauds, when no written instrument was required to make a good feoffment of the greatest landed property in the kingdom?"

custom for the sheriff to be exempt from performing, or for another person to perform the duty in that particular county, although it had been proved that such other officer had in fact always performed it within living memory. It was said that this was not a matter of public interest, the public not being interested in the question which officer was to perform the duty.

There appears to be a conflict of authority upon the question whether evidence of reputation is admissible as to the *liability* of the occupiers of certain land to repair a road, *ratione tenurae*. In The King v. Cotton,[6] it seems to have been assumed that such evidence was admissible, although the particular evidence tendered was rejected upon another ground. But in the later case of The King v. Wavertree,[7] similar evidence was rejected. It was tendered on behalf of the defendants, but, as the verdict was returned in their favor, there was no opportunity of carrying the question any further. While such evidence would establish a *private* liability, it would, at the same time, disprove the liability of the *public*. It is not, therefore, a question of private liability *per se*, in which the public are not interested. And, as reputation is admissible equally to disprove a *public right* as to establish one,[8] so it would seem such evidence should be admissible to disprove a *public liability* in the same manner as to establish it. And there seems to be no good reason why reputation should not be as good evidence to establish a liability to repair a road, *ratione tenurae*, as it is in the case of a bridge or a sea-wall.[9]

Hearsay is, in general, inadmissible to prove particular facts, *unless such facts have become matter of general reputation*. Thus, on a question of parochial modus, hearsay evidence that a particular person, since deceased, paid a certain sum in lieu of tithes, would not be admissible; but if the witness says he has heard from old inhabitants that so much per acre was always paid in lieu of tithes, or that it had always been the custom to make such payments, that will be good evidence, for it does not consist of hearsay of a particular fact, but comes within the general rule of evidence of reputation.[10] MACDONALD, C. B., said in one case:[11]

[6] 3 Camp. 444.
[7] 2 Mo. & R. 353.
[8] See Drinkwater v. Pater, 7 C. & P. 181.
[9] See R. v. Sutton, 8 Ad. & El. 516; R. v. Leigh, 10 Ad. & El. 398.
[10] Harwood v. Sims, 1 Wightw. 112, 109; Moseley v. Davies, 11 Price, 162; Garnons v. Bernard, 1 Anstr. 298; Deacle v. Hancock, 13 Price, 226; Wells v. Jesus College, Oxford, 7 C. & P. 284.
[11] In Harwood v. Sims, *ante*.

"The essence of reputation is, that if you prove a fact—as, for instance, payment of a sum of money—it must be accompanied with this, that it was so paid in consequence of a reputation. If evidence is confined to the fact of payment, it is inadmissible, unless the tradition that came with it was a reputation that it had always been the case."

But though hearsay of a custom to make certain payments is evidence, hearsay that certain lands were formerly given to the vicar in lieu of tithes is not admissible,[12] this being evidence of a particular fact, and being confined to a particular occasion. Again, though reputation is good evidence of the boundaries of a town, it is not admissible to prove that houses once stood where there are now none.[13]

Upon a question whether a part of Lincoln's Inn was part of the parish of St. Andrew, Holborn, an ancient book of antiquities, relating to the parish and collected by a churchwarden, was produced, and several entries were tendered in evidence concerning the repairs of pews and the glazing of windows. ABBOTT, C. J., refused to receive this as evidence of reputation, as it related only to particular facts.[14] But entries in an old parish book, in which the names of the surveyors of the highways were stated, have been admitted, upon the principle that it would be difficult to give other proof of persons being surveyors at the time in question.[15]

Where the question is, whether a road is public or private, the declaration of a deceased person as to a certain fact having been done (as the planting of a tree) for the purpose of showing the boundary of the road, has been held not admissible as evidence of reputation, or as a statement accompanying an act.[16] It might have been shown that a tree was planted on the spot, and that persons were accustomed to keep within the line pointed out by it; but a declaration that it was planted with a particular motive

[12] Chatfield v. Fryer, 1 Price, 253. And see Leathes v. Newel, 4 Price, 355; 8 Price, 562; Crease v. Barrett, 1 C., M. & R. 919.

[13] Ireland v. Powell, Peake Ev. 14, cited in Chatfield v. Fryer, 1 Price, 256; and in R. v. Bliss, 7 Ad. & El. 555.

[14] Cooke v. Banks, 2 C. & P. 478.

[15] R. v. Pembridge (Inhab.), Car. & M. 157.

[16] R. v. Bliss, 7 Ad. & El. 550. In this country the declarations of a deceased person have been frequently admitted, on questions of boundary involving private rights, where the witness appeared to have had the means of knowledge, and no interest in making them. Smith v. Powers, 15 N. H. 546. See next section.

and object is not evidence,[17] and declarations by deceased persons that they had seen repairs done upon the road will not be admissible upon such a question.[18]

Sec. 89. Perambulations.

Perambulations, although they consist of particular acts done (as the making of an ambit, digging turves, putting down posts, etc.), and though they give rise to much hearsay evidence, are, properly speaking, only the exercise of a right, and it is held to be usual and entirely consistent with principle to admit what old persons since deceased, who accompanied the perambulations, were heard to say on such occasions respecting the boundaries. But there does not appear to be any authority for admitting hearsay of particular acts done, as conducive to the proof of boundary, even though it is delivered on the occasion of a perambulation. In Weeks v. Sparks,[1] Lord ELLENBOROUGH, C. J., observed, upon the subject of perambulations, that they are in the nature of hearsay evidence, not of particular acts done (as that such a turf was dug, or such a post put down in a particular spot,—for that would amount to evidence of ownership), but evidence of the ambit or survey of a particular place or parish, and of what the persons accompanying the survey have been heard to say and seen to do on such occasions. LE BLANC, J., observed, in the same case, that the evidence of perambulations might be considered in a certain degree as evidence of the exercise of a right, yet that it had been usual to go further, and admit the evidence of what old persons, since deceased, had been heard to say on those occasions. Entries in parish books, recording the fact that perambulations had taken a particular line, have been held inadmissible.[2]

Sec. 90. Old Documents.

Reputation respecting public rights may be shown by old deeds or other old documents, even though of a private nature, as well as by the oral declarations of deceased individuals.[3]

[17] R. v. Bliss, 7 Ad. & El. 550.
[18] By PATTESON, J., id. 552.
[1] 1 M. & S. 687, 689.
[2] Taylor v. Devey, 7 Ad. & El. 409. See next section.
[3] This subject will receive further illustration in that part of the work which treats of documentary evidence.

A deed recorded over fifty years is an ancient deed admissible without proof of due execution,[2] and recitals in such an ancient deed may be proof as against persons who are not parties to it and who do not claim under it.[3] The rule admitting in evidence ancient documents without proof of execution is but a rule of evidence based upon the presumed death of the parties and witnesses. It cannot apply to an instrument which on its very face carries no presumption of ever having been executed as required by law. So an instrument signed by a mark without either witnesses or acknowledgment as required by statute is not admissible although more than 30 years old.[4] But in Illinois it has been held that a certified copy of a deed which has been on record more than 30 years is admissible although not acknowledged as required by the law in force when executed.[5] A copy of a record of what purpoted to be a lost patent certificate is insufficient where the original was unsealed and so not entitled to record and no witness has ever seen it. Such a document does not prove itself, though the original was claimed to be given over thirty years ago.[6]

Thus, where the question was, whether certain land was in the parish of A., or in that of B., where the land was tithe-free, ancient leases granted by the ancestors of the plaintiff's landlord, describing the lands as being in the parish of B., were held admissible as evidence of reputation, notwithstanding that such ancestor had a direct interest in describing the land to be situated in that parish. Plaxton v. Dare, 10 B. & C. 17. See, also, Arundell v. Falmouth, 2 M. & S. 443; Freeman v. Phillipps, 4 M. & S. 486; Coombs v. Coethier, 1 M. & M. 398; Barnes v. Mawson, 1 M. & S. 78; Anglesea v. Hatherton, 10 M. & W. 218; Bullen v. Michel, 4 Dow. 297; Clarkson v. Woodhouse, 5 T. R. 412, n.; S. C., 3 Doug. 189. In the case of Cambridge Tolls, Brett v. Beales, 1 M. & M., 416; see, also, Curzon v. Lomax, 5 Esp. 60, a composition deed between the corporation of Cambridge and the university, regulating the amount of payment of tolls, was received as evidence of reputation of the existence of the tolls. It appeared that the deed had not been exactly followed in practice; but it was held that this objection did not apply to its admissibility. So depositions in ancient suits have frequently been produced to prove reputation. Freeman v. Phillipps, 4 M. & S. 493. And see the cases of the Settle and Leeds Mills, cited by Lord ELLENBOROUGH, C. J., id.

[2] Stalford v. Goldring, 197 Ill. 156, 64 N. E. R. 395. An ancient deed found in the possession of an heir of one of the grantees is admissible without formal proof of execution, especially where the records from the probate court show that the possession and claim of title of the parties to it was for a long time in conformity with it. Butrick, Pet. 185 Mass. 107, 69 N. E. 1045.

[3] Young v. Shulenburg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730.

[4] O'Neal v. Tennessee Coal, Iron & R. Co., 140 Ala. 378, 37 So. 275.

[5] Bradley v. Lightcap, 201 Ill. 511, 66 N. E. R. 546.

[6] Arbuckle v. Matthews, 73 Ark. 27, 83 S. W. 326.

Sec. 91. Manorial Documents.

A customary of a manor delivered down with the court rolls from steward to steward, and purporting to be *ex assensu omnium tenentium*, although not signed by any person, has been held to be good evidence to prove the course of descent within a manor.[1] So the presentment of a custom of a manor by the homage, entered on the rolls of the manor, is receivable.[2] So ancient answers of conventionary tenants of a manor, stating the rights of the lord of the manor, and made to interrogatories put to them by commissioners, but which interrogatories were lost, have been received in evidence.[3] A presentment in a manor court, setting forth the boundaries of a manor, has been adjudged to be admissible evidence of boundary, although a part of the document, but not connected with the subject of the particular boundary, appeared to have been cut off.[4]

In an action by a copyholder against a freeholder of the manor, for the disturbance of the plaintiff's right of common,[5] by reason of the defendant surcharging the common (the plaintiff setting up a restricted right), parchment writings produced on the part of the defendant from among the muniments of the manor, purporting to be signed by many persons, copyholders, and stating an unlimited right of common in the commoners (which had been found inconvenient, and they had therefore agreed to stock it in a restricted manner), were held admissible as evidence of reputation respecting the general right at that period, and in disproof that the restricted right originated in prescription; there being no evidence that the plaintiff's tenement had belonged to any of those who had signed the writings, so as to render them admissible against him on that ground.

Sec. 92. Maps.

Maps, stating the boundaries of manor or parishes, are held even in England to be admissible in evidence to prove such bound-

[1] Denn v. Spray, 1 T. R. 466.

[2] Roe v. Parker, 5 T. R. 26. See Lord Kenyon's remarks as to the credit due to such presentments. See, also, Arundell v. Falmouth, 2 M. & S. 441.

[3] Crease v. Barrett, 1 C., M. & R. 923. See Evans v. Taylor, 7 Ad. & El. 617.

[4] Evans v. Rees, 10 Ad. & El. 151. See, also, R. v. Leigh, 10 Ad. & El. 398, 400, 404, 411.

[5] Chapman v. Cowlan, 13 East, 10.

aries, *provided it appears that they had been made by persons having adequate knowledge.* In the English case, however, where maps have been admitted, their admissibility has depended on the ground of their being public documents, or of their being in the nature of admissions. Where they relate merely to the boundaries of private property, there is no ground for receiving them, however ancient.[1] In a case where a parish had been indicted for the non-repair of a highway, in order to show that the highway was not within the parish, a map was produced which had been made, about thirty years before, by a surveyor from information derived from an old parishioner, who had pointed out the boundaries to him; and ERSKINE, J., held that if proof were given of the informant's death, the map would be admissible as evidence of reputation, although it was produced from the chest of the parish that was indicted.

In an earlier case,[2] upon a question of highway, Lord KENYON, C. J., rejected the evidence of a copperplate map purporting to have been made by the direction of former church-wardens. But it is difficult to see how there could be any valid objection to the reception of such evidence.

In this country old maps made by public authority, shown to be correct, or the authenticity of which is admitted or acted upon, are admissible,[3] especially when made by an official surveyor and verified by the oath of the surveyor;[4] and this is the rule when they relate to private rights. Thus a recorded deed dated 1806, and map attached thereto are admissible as ancient to aid in showing public rights in a certain street.[5] In an action to recover for building done under a special contract, requiring the plaintiff to conform to specific plans, other plans, as well as maps and drawings, exhibiting the various parts of the building and premises on which the work was to be done, are admissible in evidence as introductory to testimony; and a question to a witness whether such a

[1] With respect to private maps, see Doe d. Hughes v. Lakin, 7 C. & P. 481; Sir J. Bridgman v. Jennings, 1 Ld. Raym. 734; Donnison v. Elsley, 2 Eagle & Y. 1396, n.

[2] Pollard v. Smith, Peake, 18.

[3] Johnston v. Jones, 1 Black (U. S.), 209; Stein v. Ashby, 24 Ala. 521; Thrall v. Smiley, 9 Cal. 529; Dunn v. Hays, 21 Me. 76; Wilder v. St. Paul, 12 Minn. 192; Jackson v. Vandyke, 1 N. J. L. (Coxe) 28; Jackson v. Frost, 5 Cow. (N. Y.) 346; Burnett v. Thompson, 13 Ired. (N. C.) L. 379.

[4] Gates v. Kieff, 7 Cal. 124; Smith v. Strong, 14 Pick. (Mass.) 128; Surgett v. Doe, 24 Miss. 118.

[5] Village of Oxford v. Willoughby, 181 N. Y. 155, 73 N. E. 677.

plan is correct, though leading, is still proper, as mere inducement.[6] So, in a suit between the owners of adjoining land, to establish the dividing line, both parties deriving their title from the same grantor, a map annexed to the deed of the premises to said grantor, and referred to in the deed, is sufficiently authenticated *quoad* the parties to the suit, and is admissible evidence.[7] Copies of old maps and plans of Philadelphia, in the office of the surveyor-general, and certified by him, and the list of first purchasers, with the advertisement annexed, and historical books generally, received as authentic, are admissible in evidence of remote transactions.[8] So maps and ancient surveys, *as well as reputation*, are evidence to elucidate and ascertain a boundary, but not to impeach official grants on public record, where control has been long exercised in conformity to the grants.[9] In the trial of actions involving the title to lands, plans of the premises may be shown to the jury, and taken by them to the jury-room, if proved to be correct so far as they go, although they may not make a fair representation of the case.[10]

Sec. 93. Verdicts, etc.

On questions of immemorial customary rights, and on questions of public or general interest, verdicts, judgments and decrees in suits in which the same right was in litigation, are admissible in evidence, although the suits were between other parties.[1]

In the case of Reed v. Jackson,[2] where, in an action of trespass, issue was joined on a plea of public right of way, the plaintiff was allowed to give in evidence a verdict found in his favor against a different defendant, upon an issue joined as to the existence of the same right of way, LAWRENCE, J., saying: "Reputation would have been evidence of the right of way in question; *a fortiori* the finding of twelve men upon their oaths." It has been established by a long course of authorities[3] that verdicts as well as judgments and decrees are admissible as evidence of reputation. If

[6] Stuart v. Binsse, 10 Bosw. (N. Y.) 436.
[7] Crawford v. Loeper, 25 Barb. (N. Y.) 449.
[8] Commonwealth v. Alburger, 1 Whart. (Pa.) 469.
[9] Penny Pot Landing v. Philadelphia, 16 Penn. St. 79.
[10] Wood v. Willard, 36 Vt. 82.
[1] See Brune v. Thompson, Car. & M. 34.
[2] 1 East, 536.
[3] See Lord DENMAN, C. J., in Evans v. Rees, 10 Ad. & El. 156.

not amounting to reputation itself, *they are as good evidence as reputation.*[4] And in all cases involving a general right, where reputation is evidence, a verdict or a judgment—although between other parties—is evidence, not, indeed, of any *specific fact existing at the time,* but as evidence of the most solemn kind of an adjudication of a competent tribunal upon the state of facts, and the question of usage, at that time.[5]

In an early case,[6] where the question discussed was concerning the right of the city of London to take certain tolls upon malt brought to London by west-country barges, it was held that verdicts against certain owners of barges were admissible in evidence against other owners who were neither parties nor privies to the former records. Similar evidence has been received upon a question respecting the right of electing church-wardens.[7] And it does not affect the *admissibility* of such evidence, although it may diminish its weight, that a judgment has been suffered by default, and does not appear, though of recent date, to have been followed up by execution or the payment of damages, or even that the verdict has not been followed up by a judgment or decree.[8] Thus, in the case of Brisco v. Lomax,[9] on a question as to the boundary between the manors of A. and B., the finding of a jury under an ancient commission from the Duchy Court of Lancaster, for the purpose of determining the boundary between the manors of B. and C., on a petition of the owners of the two last-mentioned manors, representing that the boundary was uncertain, and that suits were likely to arise between them, was adjudged to be admissible evidence; it appearing that the three manors of A., B. and C. were so situated with reference to each other that the ascertaining of the boundaries between B. and C. would throw light upon the boundaries between A. and B., although the verdict of the jury did not appear to have been followed up by a decree or judgment. "For," as COLERIDGE, J., said, "on a question of manorial boundary between two owners, reputation is admissible;

[4] By LITTLEDALE, J., in Brisco v. Lomax, 8 Ad. & El. 211.

[5] By Lord ABINGER, C. B., in Pim v. Curell, 6 M. & W. 266.

[6] City of London v. Clerke, Carth. 181. See, also, Cost v. Birkbeck, 1 Doug. 218; the case of the Manchester Mills, 1 Doug. 221, n.; Somerset v. France, 1 Str. 659; Clarkson v. Woodhouse, 5 T. R. 412; Travis v. Chaloner, 2 Eag. & Y.; Biddulph v. Ather, 2 Wils. 23.

[7] Berry v. Banner, Peake N. P. C. 157.

[8] Carnarvon (Earl of) v. Villebois, 13 M. & W. 313. 329, 332.

[9] 8 Ad. & El. 198.

and verdicts are evidence, where reputation is admissible, between third parties. The necessity of a decree or judgment to render the verdict admissible exists only where it is sought to bind the parties conclusively by the finding; but here the verdict is not offered as conclusive evidence, *but as evidence in the nature of reputation.*"

Sec. 94. Judgments, Decrees and Orders.

In an action by the lord of a manor against a copyholder for trespassing on his free warren,[1] a judgment on *a quo warranto* brought against a former owner of the manor, wherein the then defendant pleaded, and the attorney-general confessed, a prescriptive title to the franchise of free warren as appurtenant to the manor, has been held to be evidence for the plaintiff in support of the right of free warren by prescription, as being the judgment of a competent court upon a matter of a public nature, which concerned the crown and the subject. So, on the trial of an issue whether the deputy oyster-masters of the city of London have an immemorial customary right, as claimed by them,[2] a decree of the Court of Exchequer, relative to the matter in issue, was held to be admissible in evidence, upon the same footing as a verdict is admissible on a question of custom. If the decree has a tendency to prove any fact material to the issue, it is admissible. So decrees and orders of other competent tribunals are admissible as evidence of reputation. Thus, orders of commissioners of sewers, requiring landowners to repair sea-walls, are evidence upon an issue as to the liability of a party to make such repairs; and if they are of ancient date, it will be presumed that they have been duly acted upon.[3] But a decree or order, to be admissible, must be final; mere interlocutory orders will not be evidence. Thus, in the case of Pim v. Curell and others,[4] in an action for the infringement of a right of ferry, ancient proceedings in the Court of Chancery of the duchy of Lancaster, containing orders made by the court in the matter of an information relating to the ferry, were offered in evidence on the part of the plaintiff, and received at the trial; but

[1] Carnarvon (Earl of) v. Villebois, 13 M. & W. 313, 331.
[2] Laybourne v. Crisp, 4 M. & W. 320, 327.
[3] R. v. Leigh, 10 Ad. & El. 398.
[4] 6 M. & W. 234, 266.

the Court of Exchequer adjudged the order to be inadmissible, inasmuch as it was a mere interlocutory order, and did not involve any judgment upon the facts or on the rights of the parties. But this rule as to the admissibility of verdicts and other judicial documents as evidence of reputation does not extend to awards, even in cases where the cause has been referred by an order of a judge at Nisi Prius, as the authority of an arbitrator is entirely derived from the consent of the parties to the reference, and the award is but the opinion of the arbitrator, formed upon the result of evidence laid before him, generally in private.[5] Nor will a verdict or other judicial document be receivable, unless it appear that the tribunal was acting under legal authority. Thus, upon a question respecting the jurisdiction of the Court of Sessions of the county of Chester,[6] an order and decree upon the subject by the Lord High Treasurer and certain other public functionaries of the kingdom (not forming any court known to the laws) was held inadmissible as evidence of reputation, because, as was said by Lord TENTERDEN, C. J., declarations are only evidence of reputation when made by those who have a personal knowledge of the fact; whereas, in the case in question, the persons acting as judges had no knowledge of the fact, except what was derived in the course of the proceeding.

Sec. 95. Grounds upon which these Rules are Founded.

The grounds for receiving evidence of reputation upon matters of public and general interest is, that the statements should have been made by persons likely to possess a competent knowledge of the facts to which their statements relate. It has sometimes been thought that this qualification must necessarily be satisfied where the matter is of public interest, because, as Lord KENYON, C. J., in one case observed,[1] all mankind being interested therein, it is natural to suppose that they may be conversant with the subject, and that they should discourse together about it, having all the same means of information. And Lord ELLENBOROUGH, C. J., has stated it to be the general understanding upon which the decisions of the courts have proceeded, "that upon questions of public

[5] Evans v. Rees, 10 Ad. & El. 151, 155. See, also, R. Cotton, 3 Camp. 444.

[6] Rogers v. Wood, 2 B. & Ad. 245.

[1] In Morewood v. Wood, 14 East, 329, n.

right all are interested, and must be presumed conversant with them."[2] But in a later case,[3] the court observed that it was clear that hearsay evidence upon some subjects could not be received, *unless with a qualification that it came from persons who had a special interest to inquire;* that in cases of pedigree the line was clearly defined; and that in cases of rights or customs which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, as questions with respect to boundaries and customs of particular districts, though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighborhood. Where the right is really public, as a claim of highway, in which all are interested, it is difficult to say that there ought to be any such limitation, and none seem to exist, as in a matter in which all are concerned, reputation from any one is receivable; but of course it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighborhood, or frequently using the road in dispute. In the case last cited, which related to a custom in which all were not interested, but only such as chose to become adventurers in mines within a certain district, it was said that hearsay *from persons wholly unconnected with the place in which the mines were found* would be of no value, and probably altogether inadmissible; but that the hearsay of persons under whose estates the minerals lay, with respect to which the custom existed, was admissible, because they were sufficiently connected with the subject, although not concerned in mining, nor receiving the dues of mines. In Rogers v. Wood,[4] a document, purporting to be a decree of certain public functionaries, who had no authority as a court, was held to be inadmissible as evidence of reputation on a question whether the city of Chester, before it was made a county of itself, formed a part of the county palatine, because those persons from their situations had no peculiar knowledge of the fact. In another case[5] LE BLANC, J., laid great stress upon the circumstance that the evidence of reputation in that case *proceeded from persons who had been conversant with the neighborhood where the waste*

[2] In Weeks v. Sparke, 1 M. & S. 686.

[3] Crease v. Barrett, 1 C., M. & R. 927.

[4] 2 Bing. 86.

[5] Weeks v. Sparke, 1 M. & S. 688, 689.

lay in which their statements referred; and that no evidence was received, except from prsons connected with the district then in question. But actual inhabitancy in the place of which the boundaries are in dispute is unnecessary. Thus, justices of the peace, at the sessions of the county within which the district was alleged to be, were considered, on account of the character and nature of their office, without proof of their being residents, to have sufficient connection with the subjects in dispute to render the statements in their orders, as to the location of Nottingham Castle, admissible evidence of reputation.[6] So, on a question of parochial or manorial boundary, the declarations of old persons, deceased, have been held admissible, although they were parishioners, and claimed rights of common on the wastes which their declarations had a tendency to enlarge.[7] So, on a question of parochial *modus,* it was held that the declarations of deceased parishioners and occupiers of lands in the parish who were liable to pay tithe were admissible.[8] In Crease v. Barrett,[9] certain answers of conventionary tenants were objected to as not being admissible against the freeholders of a manor, to whom it was said they had an adverse interest, and it was contended that all the cases in which the hearsay of copyholders had been received, related to questions between lord and copyholder, or copyholder and copyholder. The answers, however, were held to be admissible evidence.

Sec. 96. Position of Parties Presumed to be as Stated in Ancient Documents.

Where proceedings in an ancient suit are produced as evidence of reputation upon matters of public or general interest, it may generally be presumed that the parties to the suit and the witnesses were actually in the respective capacities which they purported to have been, without proving this by evidence *dehors* the proceedings themselves.[1] Thus, in Freeman v. Phillips,[2] an action by a copy-

[6] New Castle v. Broxtowe, 4 B. & Ad. 273.

[7] Nicholls v. Parker, 14 East, 331, n.

[8] Harwood v. Sims, 1 Wightw. 12; Moseley v. Davies, 11 Price, 162, 180; Deacle v. Hancock, 13 Price, 226. See what is said by GRAHAM, B., in 13 Price, 236.

[9] 1 C., M. & R. 927.

[1] A stricter rule has been laid down in some pedigree cases (the Banbury and Berkeley Peerage Cases), and the same point occurs in regard to declarations against interest. Davis v. Morgan, 1 C. & J. 591; Adamthwaite v. Synge, 1 Stark. R. 183, 189; S. C., 4 Camp. 372; Slane Peerage, 5 Cl. & Fin. 23.

[2] 4 M. & S. 495.

holder against the lord of a manor, in which the defendant gave in evidence the proceedings in a suit in equity in the time of King William III, brought by a copyholder of the same manor against the then lord, it was held that no evidence *aliunde* was requisite to make the proceedings admissible. BAILEY, J., said: "We must assume at this time of day that the bill was not a mere fabrication, but was really filed by such a copyholder against the lord, and that the trial was had and the deposition made between such parties as were really litigating their rights in the characters claimed and disclosed on the record." And with respect to the depositions the same judge observed: "These I do not look upon merely as the declarations of persons unconnected with the subject, but as the depositions of persons, made by them in the character of witnesses brought forward by the copyholder, whose interest it was to put foremost such witnesses as were best able to depose to the matter in dispute. Why am I to assume that the copyholder brought forward witnesses who were ignorant? I do not agree that it was necessary to prove the witnesses to have been copyholders, in order to let in their testimony. The plaintiff's witnesses in the last trial do not all appear to be copyholders, yet, as they were present at the holding of courts, and therefore knew what passed, they were competent to speak to that. So in the former suit I cannot infer that they were incompetent to have a knowledge of the facts they deposed to; on the contrary, it is to be presumed they had a competent knowledge, being brought forward as witnesses by a copyholder." Lord ELLENBOROUGH, C. J., in the same case, observed: "Considering the depositions as made in a suit which may now be said to be lost in remote antiquity, we should give this record but very little effect, if we did not attribute to it verity in many of the particular matters which it contains, such as, that the parties litigant were clothed with the rights in which they profess to stand, and were agitating the claim put forward on the record."

Sec. 97. Proof of Modern Exercise of Right.

Another cautionary rule, in receiving hearsay evidence in matters of public or general interest, has been supposed to be, at least where the nature of the case admits of it, that a foundation for it should be laid by proving acts of modern enjoyment. LE BLANC,

J., in speaking of the manner in which matters of this nature are to be proved, says:[1] "First they are to be proved by acts of enjoyment within the period of living memory; and when that foundation is laid, then, inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons of what they have heard other persons of the same neighborhood, since deceased, say respecting the right." Again: "After a foundation is once laid for the right by proving acts of ownership, the evidence of reputation becomes admissible." And BULLER, J., in another case observed:[2] "Thus far I agree with Lord KENYON and Mr. Justice ASHURST, that in no case ought evidence of reputation to be received, except a foundation be laid, by other evidence, of the right." But this does not now seem to be the rule, and in a later case,[3] in answer to an observation that all evidence of reputation was inadmissible, *unless confirmed by proof of facts,* it was said that such proof was not an essential condition of its reception, but *that it was only material as affecting the value of the evidence when received.*[4] Where the subject-matter of the question does not, from its nature, admit of acts of enjoyment, proof of reputation, though unaccompanied by evidence of acts done, is admissible. On a question respecting the custom of descent within a manor, it has been held that reputation is admissible, without showing any instances of its having been put in use;[5] for were it otherwise, if no instances were to happen within the memory of man, and the old court rolls were to be lost, the custom itself would be entirely destroyed.[6] And in one case, Lord TENTERDEN, C. J., intimated an opinion that the existence of a manor might be proved by reputation alone, without evidence of the exercise of any manorial rights.[7] It is not necessary that statements of opin-

[1] In Weeks v. Sparke, 1 M. & S. 688.

[2] In Morewood v. Wood, 14 East, 330, n. And see Ratcliff v. Chapman, 4 Leon. 242, commented on in 5 T. R. 32. In White v. Lisle, 4 Madd. 214, the vice-chancellor said that evidence of reputation was only admitted in confirmation of actual enjoyment, and not against it.

[3] Crease v. Barrett, 1 C., M. & R. 927.

[4] There was, however, sufficient proof of enjoyment given in that case.

[5] Beebee v. Parker, 5 T. R. 26, 31; Foster v. Sisson, 12 East, 62.

[6] By GROSE, J., 5 T. R. 32; Roe v. Jeffery, 2 M. & S. 92; Doe v. Mason, 3 Wis. 63.

[7] 2 Stark. R. 466. This was ruled also by Lord KENYON, C. J., in Curzon v. Lomax, 5 Esp. 60.

ion upon any subject by deceased persons should expressly appear to be founded upon reputation derived from others. Thus, on an issue whether or not certain land, in a district repairing its own roads, was a common highway, it has been held to be admissible evidence of reputation that the inhabitants held a public meeting to consider the question of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway, there being at the time no litigation on the subject.[8]

General hearsay, or, in other words, public reputation, is sometimes adduced as ancillary evidence in laying the foundation for presuming a public corporate grant. Thus, the defendant justified in trespass *de bonis,* etc., as collector, the taking of goods for parish taxes; and the Massachusetts provincial records having been burnt by two several fires, and no charter or incorporation being found among those subsisting, the defendant was allowed to prove the incorporation of the parish by general reputation.[9] Another and very common sort of hearsay is general reputation to prove that a man holds a public office or employment. This is usually introduced in connection with evidence of such acts as the office or employment imputed presupposes his right or duty to perform. The extent to which this doctrine has been applied will be partially seen by consulting our prior and subsequent notes, with the text to which they refer. We there spoke of it, with reference to the degree of evidence, as primary or secondary. We shall here add some further instances, which, while they will tend to enlarge the illustration under that head, are intended more particularly to test the application and force of hearsay evidence. In Porter v. Luther,[10] the court held that public reputation was admissible to prove the defendant a deputy sheriff, which was part of his plea of justification; and they say: "It is a general rule to admit proof by reputation that a person acts as a general public officer or deputy." In pursuance of this rule, it was received, in connection with the defendant's acts, to show that he was overseer of a certain road district;[11] to show that persons claiming to be collectors of school districts were in fact such;[12] that a military officer acting

[8] Barraclough v. Johnson, 8 Ad. & El. 99.
[9] Dillingham v. Snow, 5 Mass. 547.
[10] 3 John. (N. Y.) 431.
[11] Dean v. Gridley, 10 Wend. (N. Y.) 254.
[12] Ring v. Groat, 7 Wend. (N. Y.) 341; McCoy v. Curtice, 9 id. 17.

as president of a court martial was in fact president;[13] that a person is a constable,[14] county commissioner,[15] a justice of the peace,[16] a collector,[17] or indeed to show that any person claiming to hold a certain office acted as such, and discharged the functions of the office.

[13] State v. Gregory, 2 Murph. (N. C.) 69.

[14] Adams v. Jackson, 2 Aik. (Vt.) 145.

[15] Keyser v. McKisson, 2 Rawle (Penn.). 139.

[16] Wilcox v. Smith, 5 Wend. (N. Y.) 23.

[17] Eldred v. Sexton, 5 Ohio, 215.

CHAPTER VIII.

Hearsay to Establish Private Boundaries.

SECTION 98. Admissible, when.
99. Declarations of deceased surveyors.
100. Of persons shown to have been in a situation to know.
101. When hearsay is not admissible.
102. Declarations of owners against interest.

Sec. 98. Admissible, when.

In this country, the declarations of deceased persons, who are shown to have been in a position to know the facts, are admissible to establish the boundaries of lands owned by private persons.[1]

This species of traditionary evidence has, as we have seen, always been admitted, both in this country and in England, to prove facts of a public or general nature, and in this country most of our courts have extended the rule, and admitted this species of evidence to prove the boundaries of lands between individuals; and the extension of the rule in this respect is justified by the same necessity which justifies the original rule. In Connecticut,[2] where the question in an action of ejectment was, whether a highway reserved in 1676 was laid out over certain meadow land, as the defendant claimed, or over the upland, as the plaintiff claimed, the plaintiff, in support of his claim, offered as witnesses several aged men, who testified that when young they heard old men, since dead, say that there was a traveled road for highway over the upland, and the court held that this evidence was admissible.[3] But a traditionary or general reputation as to the possession of land cannot arise in five years.[4] In North Carolina,[5] in a case where

[1] Boardman v. Reed, 6 Pet. (U. S.) 328; Ellicott v. Pearl, 1 McLean (U. S.), 206; Wooster v. Butler, 13 Conn. 309; Howell v. Tilden, 1 Har. & M. (Md.) 84; Redding v. McCubbin, id. 368; St. Louis v. Risley, 40 Mo. 356; Adams v. Stangan, 24 N. H. 405; Dibble v. Rogers, 13 Wend. (N. Y.) 536; Nieman v. Ward, 1 Watts & S. (Penn.) 68; Spear v. Coate, 3 McCord (S. C.), 228; Blard v. Talbot, Cooke (Tenn.), 142; McCloud v. Mynatt, 2 Coldw. (Tenn.) 163; Wood v. Willard, 27 Vt. 377.

[2] Wooster v. Butler, 13 Conn. 309.

[3] Higley v. Bidwell, 9 Conn. 447; 1 Swift's Digest, 766; Porter v. Warner, 2 Root (Conn.), 22.

[4] Westfeldt v. Adams, 135 N. C. 591, 42 S. E. 823.

[5] Whitehurst v. Petiphur, 87 N. C. 179.

it became necessary to show the location of the beginning corner, under the calls of the defendant's deed, the defendant proposed to show, by his own evidence, where such corner was, by the declarations of one Gaskins, who pointed out the corner to him, and who, at the time when the declarations were made, was a slave belonging to a person who was then in the possession of an adjoining tract of land as owner, both of whom, at the time of the trial, were dead. The testimony was rejected, but upon appeal the Supreme Court held that the evidence was clearly admissible.[6] A similar doctrine is held in Vermont,[7] New Hampshire,[8] Maryland,[9] Pennsylvania,[10] Tennessee,[11] South Carolina,[12] New York,[13] Massachusetts[14] and Texas.[15] But this class of evidence is only admissible *where the person making the declaration is shown to be dead,*[16] *and is shown to have had actual knowledge of the lines*

[6] See, also, to the same effect, Harris v. Parnell, 1 Hayw. (N. C.) 349; Caldwell v. Neeley, 81 N. C. 114; Gervin v. Meredith, 2 Car. L. R. 439; Dobson v. Finley, 8 Jones (N. C.), 495.

[7] Wood v. Willard, 37 Vt. 377; Evarts v. Young, 52 id. 329; Putnam v. Fisher, 52 id. 191; Powers v. Silsby, 41 id. 288.

[8] Smith v. Powers, 15 N. H. 546; Wendell v. Abbott, 45 N. H. 349; Adams v. Stannard, 24 id. 405.

[9] Hall v. Gittings, 2 H. & J. (Md.) 112; Medley v. Williams, 7 G. & J. (Md.) 61.

[10] Bender v. Pitzer, 27 Penn. St. 333.

[11] McCloud v. Mynott, 2 Caldw. (Tenn.) 163.

[12] Shear v. Coate, 3 McCord (S. C.), 228.

[13] Dibble v. Rogers, 13 Wend. (N. Y.) 536.

[14] Bartlett v. Emerson, 7 Gray (Mass.), 174; Long v. Cotton, 116 Mass. 414.

[15] Coleman v. Smith, 55 Tex. 254.

[16] Wood v. Willard, 37 Vt. 372. See, also, the cases previously cited in this section. Blythe v. Sutherland, 3 McCord (S. C.), 258; Long v. Pellett, 1 H. & McH. (Md.) 53. And the fact that their whereabouts is unknown, or that they are out of the State, is not sufficient. Buchanan v. Moore, 10 S. & R. (Penn.) 275; Gervin v. Meredith, 2 N. C. L. R. 634. But there is a distinction in this respect between proving *general reputation* and particular declarations. In the former case, proof of the death of the person from whom the information was derived need not be proved, but in the latter it must be proved. In Smith v. Nowells, 2 Litt. (Ky.) 159, this distinction was illustrated by a matter relating to boundaries. In that case the plaintiff brought ejectment, and it appeared that the plaintiff and the defendant claimed under interfering grants from the same source—the plaintiff's being the oldest. The defendant read in evidence a patent of land to one B., older than that under which the plaintiff claimed; and to show that it covered a part of the land in controversy, asked a witness whether certain lines were, before the commencement of the action, generally reputed in the neighborhood to be the lines of B.'s survey. This was objected to, but admitted, and the court held that it was properly admitted, the court saying: "What any one, even a person who had been present at the making of the survey, *had been heard to say,* would no doubt be inadmissible, unless the *death* of such person was first proved; *but there is a difference between hearsay of particular and general reputation.* From the nature

or boundaries in question,[17] *and stood in such a relation to the property as to have no interest to misrepresent the fact,*[18] and in many of the States that *the declaration must have been made upon the ground,*[19] and, in Massachusetts, *that they must have been made by persons in the possession of adjoining land as owners.*[20] But in New Hampshire[21] it is held that the declarant need not have been upon the ground at the time when the declarations were made; and in North Carolina[22] that he need not even have been in view of the premises. As to evidence of the general reputation as to the location of a divisional line, such evidence has been uniformly received, and the restriction put upon it seems to be that the reputation, whether by parol or otherwise, should have its origin at a time comparatively remote, and always *ante litem motam;* second that it should attach itself to some monument of boundary or natural object, or be fortified or supported by evidence of occupation and acquiescence tending to give the land in question some fixed or definite location.[23] In most of the States it is not necessary that the declarant should ever have been in possession of the land as owner or otherwise, but simply *that he should be shown to have been in such a situation in reference thereto as to have actual knowledge of the facts.*[24] In a question of disputed boundary the minutes of the proceedings of the town officials laying out a certain street are competent and may be proved either by the original or by a copy properly certified.[25]

of the thing, an old boundary cannot in general be proved by direct and positive proof; and reputation is, therefore, from necessity, admissible."

[17] Wood v. Willard, *ante;* Powers v. Silsby, *ante.*

[18] Wood v. Willard, *ante;* Mason v. McCormick, 85 N. C. 226.

[19] Bender v. Pitzer, 27 Penn. St. 333; Daggett v. Shaw, 2 Met. (Mass.) 223.

[20] Barlett v. Emerson, 7 Gray (Mass.), 174; Ware v. Brookhouse, 7 id. 454; Flagg v. Mason, 8 id. 556.

[21] Smith v. Forrest, 49 N. H. 230.

[22] Scaggin v. Dalrymple, 7 Jones (N. C.), 446.

[23] Hemphill v. Hemphill (N. C. 1905) 51 S. E. 42.

[24] Wood v. Willard, *ante;* Smith v. Forrest, 49 N. H. 230; Great Falls Co. v. Worster, 15 id. 412.

To prove ancient boundaries evidence of reputation is competent and hearsay evidence consisting in the declarations of deceased persons is competent as to those of more recent origin. "It may be further said concerning hearsay evidence or declarations as to boundaries that there are three prerequisites to the competency of such evidence: (1) That the declarations must come from a disinterested person; (2) the declarations must have been made *ante litem motam;* and (3) the person who made them must be deceased, so that he cannot be produced and heard in person as a witness. Yow v. Hamilton, 136 N. C. 357, 48 N. E. 782.

[25] Cheatham v. Young, 113 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617.

Sec. 99. Declarations of Deceased Surveyors.

And upon this ground the declarations of deceased surveyors, who have surveyed that or adjoining lines, or of *any* deceased persons who are shown to have been in a situation to know the facts, although they had no interest whatever in the establishment of the boundaries, are admitted as evidence.[1] But the report of a surveyor made in an action to which neither of the present parties were involved is not admissible,[2] although the presumption is of the correctness of an official survey, until the same is impeached.[3]

[1] Miller v. Wood, Vt. S. C. 1868 (Rutland Co.); Wood v. Willard, *ante;* Porter v. Warner, 2 Root (Conn.), 22; Blythe v. Sutherland, 3 McCord (S. C.), 258. Morton v. Folger, 15 Cal. 275, holding such evidence to be a matter of necessity in a growing country.

[2] Helton v. Asher, 103 Ky. 730, 46 S. W. 22, 82 Am. St. Rep. 601.

[3] Watkins v. Havighorst, 13 Okl. 128, 74 Pac. 318. See, further, *post* § 210.

In a South Carolina case, Blythe v. Sutherland, *ante*, the question was one of location, or boundaries between the parties, and arose in an action of *trespass to try titles*, which is equivalent to a real action at common law. The witness said; "I was well acquainted with the lines of Watt's tract, a short time after they were run, and derived my information from Burnet Crafton, the original surveyor who ran them. He showed them to me four or five weeks after he made the survey. He showed me a poplar station on the north side of the Oslondy river on Riley's line, which he said was a station for both tracts, viz., Watt's and Riley's. He then showed me a stake which he said was the north-western corner of Watt's tract, and about two feet from it a hickory bush or small tree, now a stump, which he said was the corner of Riley's land. I have lived within a mile of this land ever since, and am well acquainted with it. The said Crafton further told me that the line commencing at the fallen red oak and running west was made by him, and intended at first as a boundary; but when he came to the good flat land, Watt directed him to annul and discontinue it, which he did. He then went to Riley's corner, and placed a stake as a corner for Watt's tract, near the hickory stump aforesaid, and then ran a line so as to intersect the widow Criswell's line below." This testimony was rejected at the circuit, because the surveyor's death had not been proved; but on motion for a new trial, the court held it to be obviously admissible as secondary evidence; and the omission to provide proof of the death appearing to have been inadvertent, they granted a new trial, with a view that the formality might be supplied.

The foundation of this proof as to surveyors' declarations, and the qualifications and aspects under which it is to be received, had been examined in several cases before the decision in the case last referred to. Thus, in a Pennsylvania case, Bonnett v. Devebaugh, 3 Bin. (Penn.) 175, in ejectment, it became material for the plaintiff to show a survey by A., pursuant to instructions, for C., under whom the plaintiff claimed; and the plaintiff offered to show that A., who was dead, and whose papers had been burnt, had declared that he had been instructed in writing to make the survey, and the place where. This was held inadmissible, as not being hearsay in respect to boundary, but in respect to the contents of a paper. In another case, the plaintiffs claimed to a certain extent, and according to W.'s survey. W. was dead, and to prove the extent of the survey, they offered in proof what he had said. This was

Sec. 100. Of Persons shown to have been in a Situation to Know.

It is true that declarations of persons may be introduced in evidence for the purpose of showing ancient boundaries, but to render

received, and held well. Tilghman, C. J., said: "When boundary is in question, what has been said by a deceased person is received as evidence. It forms an exception to the general rule. It was impossible for the plaintiffs to show the extent of their possession without showing the lines run by W. Those lines were the plaintiffs' boundaries; at least such was their claim. It appears to me, therefore, that what was said by W. comes within the exception which admits the words of a deceased person to be given in evidence in a matter of boundary. Caufman v. The Presb. Congregation of Cedar Spring, 6 Bin. (Penn.) 59. Again, in ejectment, the lessor of the plaintiff claimed a tract called D., in Arundel county (Maryland), according to certain lines, and was allowed to show that the surveyor appointed for that county had run the lines, and made certain declarations as to the boundaries and termination of the lines, in connection with declarations from other persons who were dead. Weem v. Disney, 4 H. & M'H. (Md.) 156. In another case the plaintiff claimed the *locus in quo* under a survey, etc., in 1785, and the defendant under a survey in 1763. On the trial the defendant offered to prove that in 1786, D., deceased, had shown a boundary line between the *locus in quo* and his, D.'s, tract; and had also shown a witness a walnut tree, as the common corner of three surveys, one for D., and another for S. and F. This testimony was admitted, and, on error, held well. Tilghman, C. J., said: "It is not denied that, in general, the declaration of a deceased person as to boundary is evidence; but it is said this declaration went to prove a survey. This objection is too refined. The substance of the evidence was, that D. showed the boundary; but this could not well be expressed without saying of what land it was the boundary. Undoubtedly, a boundary being shown, some implication would arise that a survey had been made; but this is unavoidable. It is no objection, however, to D.'s declarations. Those declarations are only in proof of a boundary; and if the jury thought the boundary established, the inference of a survey would be drawn directly from the fact of a boundary. The proving of a boundary is one thing, and the consequence of a boundary being proved another." Hamilton v. Menor, 2 S. & R. (Penn.) 70. In trespass to try titles, the plaintiff claimed a gum tree as the true corner, and was allowed to prove that G., deceased, had said he was a chain carrier at the time of the original survey, and that the gum tree was the corner then made. Spear v. Coate, 3 McCord (S. C.), 227. In ejectment, the defendant contended that the land in dispute lay within Granville's line, under which Granville he claimed; and to show this line, he was allowed to give in evidence various acts of the legislature pointing out Granville's lines as the boundaries of counties, from 1753 to 1759; and that, in 1772, the same line had been run out and marked by commissioners as Granville's line, and had ever since been the reputed line. And though it did not appear how this line was ascertained by the survey, and it was run merely to ascertain county lines, yet this evidence was held admissible. And Henderson, J., said the rule that common reputation was evidence in questions of boundary was here much better applied than when we permit a witness to swear that a person, since dead, told him that a certain tree in a remote wood was a line or a corner tree of some other person's land. Taylor v. Roe, 4 Hawks (S. C.), 116, 132. And see Harris v. Powell, 2 Hayw. (N. C.) 349.

such evidence competent, and to bring it within the exception recognized, to free it from the objection of being hearsay, unless the declarant is the owner and in possession at the time of making the declaration, such person must be shown to be dead, and shown to have had opportunities to know and *prima facie* that he had knowledge of that whereof he speaks, and to have been on the land at the time of making the declaration, or in possession of it when he made the declaration. "To be evidence the declarations must have been made when the declarant was pointing out or making the boundaries or discharging some duties thereto." And the declarant must have had no interest to misrepresent, and the declaration must have been made *ante litem motam*.[1]

And so with regard to others: "It cannot be doubted at this day that the declarations of deceased persons, who shall appear to have been in a situation to possess the information, shall, on a question of boundary, be received in evidence."[2] And there are several cases exemplifying this proposition. In ejectment, the defendant produced a witness who deposed that eighteen years ago Charles Ridgely, deceased, told him that an agreement in respect to boundaries between two tracts of land, owned by T. and J. respectively, had been before entered into by them, giving particulars.[3] It not appearing that Ridgely was interested, held his declaration was admissible. In ejectment, the plaintiff's patent called for a white oak as the beginning. He proved a marked white oak; and that this was his place of beginning, he was allowed to prove the hearsay of a deceased person, who said he heard a former proprietor, now also dead, say that the white oak was the beginning tree; and also the hearsay of another, who said he ran out (surveyed) the land for the said proprietor when he purchased it, and began at the said white oak, in the year 1766.[4] In the last case the court received what is called hearsay in the second degree.[5]

[1] Barrett v. Kelly, 131 Ala. 378, 30 So. 824. Emmet v. Perry, (Me., 1905), 60 A. 872. But in Vermont the declarations need not be made on the premises, Hathaway v. Goslant, (Vt., 1905), 59 A. 835.

[2] *Per* COLCOCK, J., in Spear v. Coate, 3 M'Cord (S. C.), 229.

[3] Hall v. Gittings, 2 H. & J. (Md.) 112, 121.

[4] Harris v. Powell, 2 Hayw. (N. C.) 349.

[5] On similar evidence being received and acted upon at a trial in Tennessee, the Supreme Court of Errors and Appeals in that State had occasion to pass directly upon its admissibility. In ejectment (A. D. 1812), it became necessary for the defendant to show where Julius Sanders and others crossed Elk river 1781, it being the place of beginning called for both in the entry and grant of the defendant. The defend-

Sec. 101. When Hearsay is not Admissible.

But no oral evidence, much less hearsay, can be received to change the objects mentioned in a deed, entry or survey, or, in other words, to substitute one object for another. When corners in a deed are lost, they may be proved by reputation, but not to contradict the deed; as, where the deed sets up a sugar and ash tree as the southeast, and two beeches for the northeast corner, reputation is not admissible to substitute a hickory, oak and beech tree for the first, nor two hickories for the other.[1] Declarations of the officers of a corporation as to the boundaries of land formerly owned by it are inadmissible as hearsay.[2]

ant introduced Joseph Greer to prove what Alexander Greer told him had been said by Sanders on that subject, both Sanders and Alexander Greer being dead. The court allowed this, though it appeared that another witness, still alive, was present and heard what Sanders said. The Court said: "We admit that every remove which is made from Julius Sanders renders the testimony weaker; but it is still competent. The object is to prove where Sanders crossed the Elk river. No doubt exists but what this may be done from evidence of what persons now dead have been heard to say. The same rule applies to all cases of pedigree, prescription or ancient landmarks. If Alexander Greer were living and present, it would be competent for him to prove what Sanders had said; and he being dead, Joseph Greer may be permitted to prove what Alexander Greer told him had been said by Sanders. It is equally competent, though weaker testimony. The reason why, in cases of pedigree, prescription and ancient boundary, the party may prove what persons, then dead, have been heard to say when living, is, that in such cases the party claiming the benefit of the evidence shall not be deprived of it by the death of the witness, if he can in any wise show what knowledge the witness had on the subject. What he has been heard to say, is pretty strong evidence of what he knew." The court admitted that perhaps the statement of the witness who heard Sanders would be more satisfactory; but it might be contended, with the same propriety, that evidence direct of what Sanders had said would not be admissible testimony, because other persons were along with him when he crossed Elk river, who are now living and capable of being produced. Beard v. Talbot, 1 Cooke (Tenn.), 142.

[1] M'Coy v. Galloway, 3 Ohio, 282, 283.

[2] Southern Iron Works v. Central of Georgia Railway Co., 131 Ala. 649, 31 So. 723.

The admissibility and influence of hearsay and reputation, in respect to boundaries, was much considered by Washington, J., on a question which arose as to the extent of a tract of land called the manor of Springetsbury, in the State of Pennsylania. William Penn, the patentee of the whole State (province) from Charles the First (in 1668), and his descendants, the proprietors, established and kept on foot a land-office, and issued regulations whereby settlers might, by locations and surveys, to be made according to the rules of the office, acquire equitable rights to conveyances of the lands so designated by them; the proprietors reserving a right to appropriate to themselves one-tenth of the State, by the like surveys. These regulations continued, and were recognized by the government as valid, from the time of

Sec. 102. Declarations of Owners against Interest.

Declarations by the *owners* of the land, *made against their pe-*

the original grant down to 1776. Under them, in 1722, a survey was made by the government, and recognized by the proprietors of about 70,000 acres, reserved lands, under a warrant to surveyors, pointing out the precise metes and bounds of the tract. This tract was surveyed for the use of Springet Penn, one of the proprietors; but it did not appear whether the survey was made in fact on the land, by marks, designation or admeasurement, or whether it might not have been a mere paper survey, drawn out into a map from calculations made under the warrant. Afterwards, from this time to 1768, various contracts or licenses of sale, and warrants of survey, etc., were granted by the proprietors of this manor to settlers as within the manor; and others claimed to have located upon territorial lands without the manor; but the latter, as the proprietors claimed, had located, in truth, within the manor. There had been a resurvey by the proprietors in 1768, in consequence of the one in 1722 having been destroyed. This last comprehended all the settlers whose rights were in question in the suit. That of 1722 comprehended only a part. A bill in equity was filed by all those settlers against J. and W. Penn, the now legal proprietors, to compel a specific execution of the several contracts made by those under whom they claimed; and it became quite material, in respect to the different interests of the complainants, to ascertain the true bounds of the manor. It appeared most abundantly from the acts of the proprietors intermediate 1722 and 1768, such as licenses to take up, and grants of specified tracts of land, and a warrant for laying out a town, warrants to agree for land, and warrants to adjust differences among settlers, etc., that they all along supposed the manor to comprehend the lands covered by the last survey. A letter was received in evidence respecting the boundary, directed to one of the proprietors. The actual settlements and improvements made by licensed settlers within the manor, and the surveys and settlements made around and adjoining the different lines of the manor, were also in evidence. All these were intermediate the survey of 1722 and 1768; and they all had reference to or accorded with the boundaries in the last survey. These things together showed the putative boundaries of the manor to agree with the last survey as early as 1736, and from that time to 1814; and this, although, as Judge WASHINGTON expresses it, the two surveys varied extravagantly. He could find in the proof no intermediate survey to account for this; and he supposes that the locations, being made in such utter disregard of the first survey, might have arisen from the lines of that survey not being actually measured, but guessed at, or some of the courses only being run. On the subject of such surveys, followed by reputed and practical boundaries which conflicted with them, and the evidence receivable on this head, he proceeds: "No gentleman of the profession, who is at all conversant with land trials, can be ignorant that the courses and distances laid down in a survey, especially if it be ancient, are never in practice considered as conclusive; but, on the contrary, they are liable to be materially changed by oral proof, or other evidence tending to prove that the documentary lines are not those actually run. How often have we known reputed boundaries, proved by the testimony of aged witnesses, and even by hearsay evidence, established in opposition to the most precise calls of an ancient patent? such evidence has been constantly received; and distances have been lengthened or shortened without the slightest regard to the call of the patent. The reason is obvious; it is not the lines reported, but the lines actually run by the surveyor, which vests in the patentee the area in-

cuniary or proprietary interest, are admissible,[1] provided they do not question a title which the declarant had no right to question,[2] and under this rule the declarations of one in possession of land, in disparagement of his own title, are admissible in evidence against him and those claiming under him; but declarations in favor of his own title are inadmissible.[3] Thus, the declaration of a person made upon land, while he was in possession thereof under an undisputed claim of title, that his line extended to a certain boundary, which he pointed out at the time, is admissible in evi-

cluded within these lines. The survey returned, or the patent, is the evidence of the former; natural marks of reputation is, in almost all cases, the evidence of the latter. The mistakes committed by surveyors and chain carriers, more particularly in an unsettled country and wilderness, have been so common, and are so generally acknowledged, as to have given rise to a principle of law, as well settled as any which enters into the land titles of this country, which is, that when the mistake is shown by satisfactory proof, courts of law, as well as courts of equity, have looked beyond the patent to correct it. It will readily be admitted that such evidence should be cautiously received, if it should have a preponderating influence in determining the question of boundary. Subsequent locators look, in the first instance, to the survey as made and returned, for a demarkation of the tract, with which they must not interfere. But if a mistake is apparent upon the face of the survey, taken in connection with the natural and artificial marks on the ground; if the reputation of the neighborhood has assigned to the tract of land so surveyed, boundaries different from those delineated on the survey returned, a subsequent location is so far affected by notice of the real boundaries of the tract on which it would adjoin, that a claimant under it cannot, even in a court of equity, set up his posterior equitable title against the legal or equitable title of the first locator. In short, he cannot assert that he was a purchaser without notice, in the face of strong evidence to the contrary." Conn. v. Penn, 1 Pet. (U. S.) C. C. 496.

[1] Putnam v. Fisher, 52 Vt. 191; Evarts v. Young, 52 id. 329; Smith v. Martin, 17 Conn. 399; Beers v. Hawley, 2 id. 467; Dunning v. Carrington, 12 id. 1; Rogers v. Moore, 10 id. 13; Norton v. Pettibone, 7 id. 319; White v. Long, 24 Pick. (Mass.) 319.

[2] Parsons, J., in Putnam v. Fisher, *ante.*

[3] Osgood v. Coates, 1 Allen (Mass.), 77; Maxwell v. Harrison, 8 Ga. 61; Alden v. Gilmore, 13 Me. 178; Peabody v. Hewett, 52 Me. 33; Webster v. Saunders, 4 H. & J. (Md.) 287; West Cambridge v. Lexington, 2 Pick. (Mass.) 536; Church v. Burghardt, 8 id. 327; Niles v. Patch, 13 Gray (Mass.), 254; Hale v. Silloway, 1 Allen (Mass.), 21; Dow v. Jewell, 18 N. H. 340; Woods v. Blodgett, 18 N. H. 249; Spence v. Smith, id. 587; Bell v. Woodward, 46 N. H. 315; Waring v. Warren, 1 Johns. (N. Y.) 340; Jackson v. Bard, 4 id. 230; Jackson v. Shearman, 6 id. 19; Jackson v. Anderson, 4 Wend. (N. Y.) 474; Podgett v. Lawrence, 10 Paige (N. Y.), 170; Jackson v. Cole, 4 Cow. (N. Y.) 587; Pitts v. Wilder, 1 N. Y. 525; Gibney v. Marchay, 34 N. Y. 301; Burlingame v. Robbins, 21 Barb. (N. Y.) 327; Heister v. Laird, W. & S. (Penn.) 245; Sailor v. Hertzogg, 2 Penn. St. 182; Read v. Thompson, 5 id. 327; St. Clair v. Shale, 9 id. 252; Sample v. Robb, 16 id. 305; Alden v. Grove, 18 id. 377; Leger v. Doyle, 11 Rich. (S. C.) L. 109; Wallace v. Wilcox, 27 Tex. 60.

dence, *after his decease,* in favor of those who claim under him, on the trial *of a question arising subsequently* concerning the boundary line of the same tract of land.[4] Declarations of persons in possession of property can only be given in evidence as part of the *res gestae,* or in respect to their interest in the subject-matter,[5] and a party must be proved to have been in possession, before his declarations made at the time are admissible as part of the *res gestae,* and as explanatory of the possession.[6] So, in Maine, the rule seems to be confined to cases where the owner makes the declaration while pointing out the boundary.[7] But in Vermont declarations by a deceased person while in possession of land as to its boundaries are admissible although not a part of the *res gestae* nor accompanying any act affecting the declarant's title, and even though not made upon or in the immediate vicinity of the boundary referred to.[8] And in New Hampshire declarations of a former deceased owner of land made while in possession are competent upon the question of its boundaries in favor of as well as against one claiming under him.[9] In an action of ejectment, the admissions of the person occupying the land are incompetent unless there can be some privity shown between him and the defendant; and even then are inadmissible if he can be personally called as a witness.[10] Where a tenant has made admissions or declarations as to the character and extent of his tenancy, they are admissible against him in a suit between him and his landlord in respect to the possession, no matter to whom they were made. It is not essential that such admissions, to be available, should be made to the

[4] Wood v. Foster, 8 Allen (Mass.), 24; Barrett v. Kelly, 131 Ala. 378, 30 So. 824.

[5] Degraffenreid v. Thomas, 14 Ala. 681; Andrews v. Fleming, 2 Dall. 93; Bliss v. Winston, 1 Ala. 344; Nelson v. Iverson, 17 id. 216; Hadden v. Powell, id. 314; Perry v. Graham, 18 Ala. 822; Thompson v. Drake, 32 Ala. 99; Williams v. Ensign, 4 Conn. 456; Hillhouse v. Dunning, 7 Conn. 139; Dawson v. Callaway, 18 Ga. 573; West v. Price, 2 J. J. Marsh. (Ky.) 380; Young v. Adams, 14 B. Mon. (Ky.) 127; Marcy v. Stone, 8 Cush. (Mass.) 4; Hodgdon v. Shannon, 44 N. H. 572; Duffey v. Congregation, etc., 48 Penn. St. 46; Trotter v. Watson, 6 Humph. (Tenn.) 509.

[6] Ellis v. Janes, 10 Cal. 456; Thomas v. Degraffenreid, 17 Ala. 602; May v. Jones, 4 Litt. (Ky.) 21; Whiting v. Bacon, 9 Gray (Mass.), 206; Tomlin v. Den, 4 Harr. (Del.) 76; State v. Emory, 6 Jones (N. C.) L. 133; Reed v. Dickey, 1 Watts (Penn.), 152.

[7] Emmet v. Perry (Me., 1905), 60 A. 872.

[8] Hathaway v. Goslant (Vt., 1905), 59 A. 835.

[9] Nutter v. Tucker, 67 N. H. 185, 30 A. 352, 68 Am. St. Rep. 647.

[10] Hanley v. Erskine, 19 Ill. 265.

landlord or his agent.[11] The declaration of a deceased tenant in common of land, that he had made a verbal division with his co-tenant, and subsequently that he had received from his co-tenant a deed of division, was held to be admissible in evidence against his heirs in support of the presumption that he gave a corresponding deed to his co-tenant.[12] So declarations of an occupant of land, while in possession, that he was only a tenant of another, are competent evidence in favor of the latter against a third person, after the death of the occupant, but not before.[13]

Declarations made by an owner in his own favor are not admissible to show the location of a boundary, but are for the purposes of showing non-acquiescence in a different line or boundary.[14]

[11] Secor v. Pestana, 37 Ill. 525; Hamilton v. Paine, 17 Me. 219; Williams v. Mayor, 6 H. & J. (Md.) 529.

[12] White v. Loring, 24 Pick. (Mass.) 319.

[13] Currier v. Gale, 14 Gray (Mass.), 504; Rand v. Dodge, 17 N. H. 343.

[14] In Young v. Evarts, *ante*, such declarations were admitted to show non-acquiescence, but not to prove the true line, the declarant being interested. The court said: "The plaintiff's testimony tended to show that he and his brother Anson and father Reuben, in 1831, procured a surveyor, Judge Beeman, to run the line—not on the line between the lots—so that there was an exchange of a small amount of land between them, and that the line thus run was acquiesced in by him and Anson Evarts until the death of Anson Evarts, in 1874, and was the line to which he claimed. This testimony was uncontradicted, except by the declarations of Anson Evarts, made within the last twelve or fifteen years, that the 'stone corner' was the corner of his land, and by a declaration of the plaintiff, made nineteen years before the trial, in regard to the location of the end of a wall built by him, running at right angles with the line. The declarations of Anson Evarts were allowed to be shown, against the exception of the plaintiff, and were allowed by the court to be used as tending to show where the line between them in fact was. In giving, or allowing to be given, to this evidence this scope and effect, we think the County Court erred. A party is not allowed to show his own declarations or the declarations of those through whom he claims title, in his own favor, unless such declarations accompany and give character to some act affecting his title, and so become a part of the *res gestae*. This subject has frequently received the consideration of this court. In Wood v. Willard, 36 Vt. 82, it was held that the declaration of the grantor as to where his line was, made at the time he sold and conveyed the premises to the plaintiff, and while upon the premises pointing out the line, were not admissible. On the other hand, in Kimball v. Ladd, 42 Vt. 747; Noble v. Sylvester, id. 146; Perkins v. Blood, 36 id. 273, it is held that the declaration of a party or of a person through whom the party derives title, made while exercising a right or easement, and tending to show that he claimed to exercise it in his own right, or that he had not abandoned his prior possession or right to a piece of property, are admissible for such purpose only. Under this rule the declarations of Anson Evarts allowed to be shown were admissible to rebut the testimony of the plaintiff tending to show that at the several times when they were made, Anson Evarts was acquiescing in the line claimed by the plaintiff, and only for

The same rule as to *lis mota* prevails in reference to this class of declarations as prevails in reference to declarations relating to

such purpose. They were not admissible for the purpose of showing where the Beeman line was, nor where the true line between him and the plaintiff then was; and on the question of acquiescence they should be confined strictly to the periods of time at which they were respectively made, and not be allowed as tending to show that he had not, from 1831 to the time of making such declarations, acquiesced in the line, as the plaintiff's testimony tended to show. Acquiescence is the state of a party's mind regarding a particular subject or thing, and his declarations on that subject or thing are the indices of his state of mind thereon at the times they are respectively made.

"These declarations, although Anson Evarts has deceased, do not fall within the rule established in Wood v. Willard, 37 Vt. 377; Powers v. Silsby, 41 id. 288, and some other more recent cases, allowing hearsay testimony, or declarations in regard to ancient boundaries between the estates of private individuals. The rule for the admission of such testimony, as expressed by PIERPOINT, C. J., in Wood v. Willard, *supra*, is, 'that the declarations of deceased persons who had actual knowledge as to the location of such boundaries, or who, from their connection with the property itself, or their situation and experience in regard to such boundaries and the surveys thereof, had particular means of knowledge, so that it may fairly be inferred that they had actual knowledge of the same, *made at a time when they had no interest to misrepresent*, * * * may be received as to the location of such boundary, when from lapse of time there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject.' It is an important qualification that the declarant, at the time of making the declaration, should have no interest to misrepresent. Anson Evarts making a claim in his own favor was not thus disinterested. Whether the transaction in regard to the Beeman line was of such antiquity as to allow this class of testimony for the establishment of its location, is not admitted nor decided, as this testimony for this purpose is held inadmissible, on the ground that Anson Evarts, when he made the declarations, was interested in having the stone corner established as his corner."

The following is an abstract of a portion of Hunicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113: A witness called to prove the location of private lands was allowed to testify that one M., a surveyor, had, while absent from the lands in question, told him the location and direction of certain boundary lines which M. said to witness he (M.) had surveyed, and witness was allowed to state what the declarations of M. were. Held error. Ellicott v. Pearl, 10 Pet. (U. S.) 412; Bartlett v. Emerson, 7 Gray (Mass.), 174; 5 Met. (Mass.) 223; Long v. Cotton, 116 Mass. 414; Bender v. Pierce, 27 Penn. St. 335. The conclusion to which a great majority of the decisions of State courts lead upon this subject is this: In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible, unless they were made by persons shown to have had knowledge of that whereof they spoke, or persons on the land, or in possession of it when the declarations were made. To be evidence, they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence.

In Long v. Cotton, 116 Mass. 114, the court said: "The declarations of deceased persons respecting bound-

matters of general or public interest; therefore reference is made to that chapter for the rules in that respect.

aries are received as evidence as an exception to the rule which rejects hearsay testimony. In most of the decided cases it is held that the declaration should appear to have been made in disparagement of title, or against the interest of the party making it; but in Daggett v. Shaw, 5 Met. 223, it is said that the rule as practiced in this commonwealth, is not so restricted, and that declarations of ancient persons, made while no possession of land owned by them, pointing out their boundaries on the land itself, are admissible as evidence when nothing appears to show that they are interested to misrepresent, and it need not appear affirmatively that the declaration was made in restriction of or against their own rights. And in Bartlett v. Emerson, 7 Gray, 174, it is held that to be admissible, such declarations must have been made by persons now deceased, while in possession of land owned by them, and in the act of pointing out their boundaries, with respect to such boundaries, and when nothing appears to show an interest to deceive or misrepresent. Ware v. Brookhouse, 7 Gray (Mass.), 554; Flagg v. Mason, 8 id. 556.

"The declarations offered and rejected at the trial do not come within the exception thus defined to the rule by which hearsay is excluded. The decisive objection to their competency is that they do not appear to have been made while in the act of pointing out the boundaries of the declarant's land. This is an element which cannot be disregarded, especially when the question is one of private boundary. The declaration derives its force as evidence from the fact that it accompanies an act which it qualifies or gives character to. The declaration is then a part of the act. Without such accompanying act, the declaration is mere narrative, liable to be misunderstood or misapplied, and open to the objections which prevail gainst hearsay evidence.

"The declaration rejected does not appear to have been offered for the purpose of establishing a boundary by traditionary evidence or reputation. Such evidence has sometimes been said by American courts to be admissible; and in the cases from New Hampshire, cited by the defendant, it seems to be held that declarations of deceased persons, who, from their situation, appear to have the means of knowledge, and who have no interest to misrepresent the facts, are admissible to establish private boundaries, although not made on the land. Smith v. Forrest, 49 N. H. 230, 237; Great Falls Co. v. Worster, 15 id. 412, 437. But by the current of authority and upon the better reason, such evidence is inadmissible for the purpose of proving the boundary of a private estate, where such boundary is not identical with another of a public or *quasi* public nature. 1 Greenl. Ev. § 145; 1 Phil. Ev. (N. Y. ed. 1849) 241, 242; Cowen & Hill's Notes; Hall v. Mayo, 97 Mass. 416."

CHAPTER IX.

Dying Declarations.

Section 103. When admissible.
104. To what matters admissible.
105. Declarations must be complete.
106. Considerations which should control as to admission of.

Sec. 103. When Admissible.

Another exception to the rule excluding hearsay evidence, which, however, is of more importance in criminal, than in civil cases, is made in favor of the declarations of a deceased person, made *in extremis*, as to the cause of his death and the person who inflicted the fatal wound; in criminal cases only where the death of the deceased is the subject of the charge,[1] and the circumstances of the death are the subject of the dying declarations, and never, under any circumstances, in civil cases;[2] and this rule is held not to impugn the constitutional right of the accused to be confronted by the witnesses against him, as the constitution does

[1] Confined to homicide. Thayer v. Lombard, 165 Mass. 174, 42 N. E. 563, 52 Am. St. Rep. 507. Under an indictment not charging specifically either murder or manslaughter, but setting forth an attempt on the part of the defendant to procure an abortion, in consequence whereof the woman died, the dying declaration of the woman is admissible in evidence. State v. Meyer, 65 N. J. L. 237, 47 A. 486, 86 Am. St. Rep. 634, and note, page 637. See, also, Montgomery v. State, 80 Ind. 338, 41 A. 815.

[2] State v. Quick, 15 Rich. (S. C.) 342; Thompson v. State, 24 Ga. 297; People v. Vernon, 35 Cal. 49; State v. Reed, 5 Phila. (Penn.) 528; State v. Brunetto, 13 La. An. 45; State v. Nash, 7 Iowa, 347; Wulston v. Com., 16 B. Mon. (Ky.) 15; McDaniel v. State, 16 Miss. 401; Com. v. Casey, 11 Cush. (Mass.) 417; Burrell v. State, 18 Tex. 713; State v. Pall, 1 Hawks (N. C.), 442; Nelson v. State, 7 Humph. (Tenn.) 542; Moore v. State, 12 Ala. 764; Robbins v. State, 8 Ohio St. 131; Bull's Case, 14 Gratt. (Va.) 613; State v. Center, 35 Vt. 378; People v. Knickerbocker, 1 Parker Cr. (N. Y.) 302; State v. Arnold, 13 Ired. (N. C.) L. 184; State v. Thawley, 4 Har. (Del.) 562; Dunn v. State, 2 Ark. 229; Goodall v. State, 1 Oregon, 333; Cone v. Cooper, 5 Allen (Mass.), 495. The dying declarations of a person fatally injured by the negligence of another, as to the facts attending the injury, are not admissible against such person in a civil action brought to recover damages for the injury. Daily v. N. Y., &c., R. R. Co., 32 Conn. 356. See also, Wilson v. Boerem, 15 John. (N. Y.) 286; R. v. Mead, 2 B. & C. 608; 1 East's P. C. 353; Waldele v. N. Y. Central R. R. Co., 61 How. Pr. (N. Y.) 350.

not alter the rules of evidence, but leaves it to the law to determine what a witness, when confronted, shall be allowed to state as evidence.[3] But in order to make such declarations admissible, they must have been made *while the deceased was actually in danger of death, and under the settled conviction that he was about to die, and when death did actually ensue,*[4] and the question as to whether these elements existed is to be determined in view of all the circumstances, as the nature of the wound, the declarations of the deceased in that regard, and the sense of impending death incident to his condition.[5] Where the victim in a homicide case repeatedly expresses the opinion that he is about to die the declaration made at the time is admissible, although after it he rallied and used language which indicated that he was then not without hope of recovery, where he died subsequently after an interval of several hours from the making of the statement. The controlling question is whether the declarations were uttered under a sense of impending dissolution and the fact that death did not immediately ensue, or that a hope of recovery was subsequently entertained, would not effect their admissibility.[6] So, where a deceased person had been in a fight and subsequently walked home and there became nauseated, but had no external indication of injury, and had not been appraised that he was in danger, the fact that he tells his

[3] Walston v. Commonwealth, 16 B. Mon. (Ky.) 15; Campbell v. State, 11 Ga. 353; State v. Price, 6 La. Ann. 691; Commonwealth v. Carey, 12 Cush. (Mass.) 246; Burrell v. State 18 Tex. 713; People v. Glenn, 10 Cal. 32; State v. Nash, 7 Iowa, 347; Woodsides v. State, 3 Miss. 655.

[4] United States v. Woods, Cranch (U. S. C. C.) 484; United States v. Veitch, 1 id. 115; Dunn v. State, 2 Pick. (Mass.) 229; People v. Lee, 17 Cal. 76; People v. Ybana, id. 166; People v. Sanchez, 24 Cal. 17; Walston v. Commonwealth, 16 B. Mon. (Ky.) 15; Brown v. State, 32 Miss. 433; People v. Knickerbocker, 1 Park. (N. Y.) Cr. 302; Montgomery v. State, 11 Ohio, 424; Robbins v. State, 8 Ohio St. 131; Brakefield v. State, 1 Sneed (Tenn.), 215; Nelson v. State, 7 Humph. (Tenn.) 542; Lewis v. State, 17 Miss. 115; Smith v. State, 9 Humph. (Tenn.) 9; Logan v. State, id. 24; State v. Center, 35 Vt. 378; Bull's Case, 14 Gratt. (Va.) 613. Lord DENMAN, in the Sussex Peerage Case, 11 Cl. & F. 108, laid down the rule as follows: "With regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as actual danger, death following it and a full apprehension, at the time, of the danger and of death, such declarations can be received in evidence, *and all these things must concur* to render such declarations admissible. Such evidence, however, ought to be received with caution because it is subject to re-cross-examination."

[5] Sullivan v. Cone, 93 Penn. St. 284.

[6] State v. Reed, 53 Kan. 767, 37 P. 174, 42 Am. St. Rep. 322.

family he is going to die would not render his declarations at the time admissible, as that is insufficient proof to show that he was under an impression of almost immediate dissolution.[7] Where one is shot and others in the house rush to his assistance immediately when he cries "Charlie has shot me to death" and dies soon after, this explanation is admissible as part of the *res gestae*.[8] It is not necessary that the declarations should have been made in words by the deceased; it is sufficient if they are made by signs in response to inquiries put by a person present, and the jury will give such weight thereto as they deem them entitled to in view of all the circumstances. This is well illustrated by a Massachusetts case.[9] In that case, T., being at the point of death, and conscious of her condition, but unable to speak articulately, in consequence of wounds inflicted upon her head, was asked whether it was C. who inflicted the wounds, and if so, she was requested to squeeze the hand of

[7] State v. Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405.

[8] State v. Arnold, 47 S. C. 9, 58 Am. St. Rep. 867, 24 S. E. 926.

Thus, in an Alabama case, Johnson v. State, 17 Ala. 618, the deceased was poisoned on Sunday, and from that time until Tuesday evening, when she died, suffered severely from a burning pain in her stomach and bowels. On Sunday night, on Monday, and on Tuesday, just before she made a declaration, she used such expressions as, "I cannot stay here, I must go—good people, I am gone," and her medical attendant considered her *in extremis* from Tuesday morning until she died. Between 9 o'clock a. m. and noon on Tuesday she asked her medical attendant if he could help her, to which he replied, he thought he could. It was held that the inquiry and reply, taken in connection with such strong evidences of a sense of impending death, did not prove anything beyond the hope of present ease or relief, and were insufficient to exclude the declaration of the deceased. In another case, McDaniel v. State, 16 Miss. 401, on the day on which the mortal blow was given, the witness said to the deceased that his deposition ought to be taken, as, in the opinion of the witness, he must inevitably die before morning. The deceased replied that he thought so too, and afterwards exclaimed, "O Lord, I shall die soon!" His declarations were reduced to writing, read over to him twice, and signed by him. On the evening previous his physician had held out to him some hopes of recovery, but told him his chance was bad. The deceased lived, however, some ten days after. It was held that his declarations were admissible as dying declarations. In a North Carolina case, State v. Pearce, 1 Jones (N. C.) L. 251, the deceased was cut with a knife into the coats of his stomach, was very weak from the loss of blood, and said that he must die, and did die, two days afterwards, of the wound he had received. It was held that his account, in a conversation of short duration, as to the manner in which the conflict began and was continued between him and the prisoner, was admissible as dying declarations, although the witness could not say whether the opinion expressed by the deceased that he must die was before or after the narration of the facts, there being no evidence that during the time of this short conversation the condition of the deceased was materially changed.

[9] Com. v. Casey, 11 Cush. (Mass.) 417.

the person asking the question. Thereupon she squeezed the hand of the person making the inquiry. It was held that under all the circumstances of the case there was proper evidence against C. for the consideration of the jury, they being the sole judges of its credibility, and of the effect to be given to it. But declarations so made are not admissible,[10] unless it clearly appears that the deceased understood the inquiries clearly as well as the nature of his responses thereto. In the case last cited, an attorney, being present on the night when one who had witnessed a murder was dying, propounded questions to him which he tried to answer, but could not, and his attendant friends then "explained the questions to him, and made the answers, to which he assented only by nodding his head." The statement consisting of the answers thus made was, when finished, "read over to him by the attorney slowly and distinctly, and he signified his assent thereto by nodding his head;" "he spoke but a few words afterwards, and had frequently to be aroused; and seemed, while the statement was being read to him, to be in a stupor." It was held that this was not admissible evidence. Nor are such declarations admissible if the deceased entertained *any, even slight,* hopes of recovery.[11] Thus, in the case last cited, forty-eight hours after the shooting, the deceased clearly thought that he could not recover, and acted as if he was not to live but a short time, though the surgeons, to soothe him, assured him that he would live, and one of them thought he did entertain some hopes of his recovery, and it rather appeared that he did entertain some hopes. His declarations were not admitted.[12] In a California case,[13] the court recognized this rule and applied it in a case where, in her dying statement, the deceased said: "Believing I am very near death, and realizing that *I may not recover,* etc." From this expression the court held that it was clear that the deceased entertained *slight* hopes of recovery, and, although she in fact died within an hour after making the statement, rejected it. "If it shall appear," said Ross, J., using the language of the court in a previous case,[14] "in any mode, *that there was a hope of recovery, however faint it may have been,* still lingering in his breast, . . . his statement cannot be received."[15] But the

[10] McHugh v. State, 31 Ala. 318.
[11] State v. Nash, 7 Iowa, 287.
[12] People v. Robinson, 2 Parker's Cr. Rep. (N. Y.) 235.
[13] People v. Hodgdon, 55 Cal. 72.
[14] People v. Sanchez, 24 Cal. 24.
[15] State v. Wilson, 24 Kan. 189.

fact that the deceased does not state in his declaration that he makes it in immediate expectation of death, does not affect its admissibility, if it contains nothing to show that he entertained any hope of recovery, and it reasonably appears that he did not entertain any such hope.[16]

Sec. 104. To what Matters Admissible.

Another important qualification of the rule is to be borne in mind, and that is, *that such declarations are only admissible as to matters about which the deceased would have been competent to testify, if sworn to in the cause,* and, consequently, such declarations should relate to *facts,* and not to the *opinion or belief* of the deceased.[17] But the fact that the examination was not conducted in the manner in which it would have been conducted in court does not affect the admissibility of the statement, but may affect its credibility.[18]

Sec. 105. Declarations must be complete.

Another important qualification to the rule is, that *the declaration must be complete* in itself, and if it appears that he deceased intended to qualify his statement, but was prevented from doing so from any cause, it will not be admissible.[1] So the declarations are not admissible when clearly fragmentary or when it does not appear that the declarant stated who it was had caused his injury and where the evidence of the declarations is incomplete.[2] When the declaration has been committed to writing at the time it was made, it must be produced or accounted for, and neither a copy

[16] State v. Wilson, 24 Kan. 189; 36 Am. Rep. 257. And in this case such declarations were held admissible, although the deceased had previously given his testimony upon the preliminary examination of the respondent. Dumas v. State, 62 Ga. 58.

[17] McPherson v. State, 22 Ga. 478; Whitley v. State, 38 Ga. 50; R. v. Sellars, Car., C. & L. 233. In Merrill v. State, 58 Miss. 65, it was held that the portion of a declaration of a deceased person which related to *threats* made by the respondent *two weeks* before the injury was inflicted, was not admissible, but the remainder of such declarations are admissible if otherwise not objectionable. Jones v. State, 71 Ind. 66; Brotherton v. People, 75 N. Y. 139. In State v. Wood, 53 Vt. 560, to a question, "Had she threatened to injure you before?" the deceased responded, "Yes, she had threatened a thousand times to kill me, before," and such statement was held inadmissible.

[18] Com. v. Vass, 3 Leigh (Va.) 786; Rex v. Fagent, 7 C. & P. 238.

[1] Com. v. Vass, *ante.*

[2] State v. Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405.

nor parol evidence can in the first instance be admitted to supply the omission.[3] But where several declarations were made, only one of which has been committed to writing, all may be proved;[4] and if the deposition of the deceased has been taken under the statute, but for any cause is inadmissible as such, it is still, if made *in extremis,* admissible as a dying declaration.[5] Such declarations are admissible as well for as against the respondent.[6] But in Illinois[7] it is held that such declarations, not a part of the *res gestae,* are not admissible in exculpation of the accused; but such a doctrine would be very unjust,[8] and it is believed that the Illinois cases cannot really be said to go further than to hold what has already been stated to be the rule, that such declarations are not admissible when they relate to opinions rather than facts, as was the case in both of the cases cited from that State.

Sec. 106. Considerations which should Control as to Admission of.

It is the universal judgment of the courts, text-writers, and all thinking men, that this class of evidence is to be received with great caution, and, except where the circumstances were such as to render it next to impossible that the deceased could be mistaken as to the criminating facts stated, juries should scan the statement with great care, especially where there is evidence tending to show that the deceased was mistaken, for it is to be remembered that while the deceased made the statement under the apprehension of certain death, yet the respondent has not had the privilege of cross-examining the witness, or testing the real foundation of the deceased's belief as to his guilt, and that where the witness has not a deep sense of accountability to his Maker, and an enlightened conscience, the passion of anger, and feelings of revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the truth and accuracy of his statements, and give a color to the transaction which, had further investigation been attainable, might have been proved to be incorrect. Moreover, the particulars of the

[3] Taylor on Ev. § 506.
[4] Kirby v. State, 8 Tex. App. 1.
[5] Rex v. Woodcock, 1 Lea. C. C. 502.
[6] Rex v. Scaife, 2 Lewis C. C. 150; People v. Knapp, 26 Mich. 112; Moore v. State, 12 Ala. 274.
[7] Maeck v. People, 100 Ill. 242; Adams v. People, 47 id. 376.
[8] People v. Knapp, *ante.*

violence to which the deceased has spoken are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.[1]

[1] Jackson v. Kniffen, 2 John. (N. Y.) 35, 36, *per* LIVINGSTON, J.; R. v. Ashton, 2 Lew. C. C. 147, *per* ALDERSON, B. See, also, Mr. EVANS' observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255 (293); 2 St. Ev. 367, and 1 Ph. Ev. 292.

CHAPTER X.

Declarations by Deceased Persons Against Interest.

Section 107. General rule.
108. Kinds of declarations admitted.
109. Conditions precedent to the admission of.
110. Entries in private books, etc.
111. Admissibility as against surety of declarations of principal.
112. Illustrations of the application of this exception.
113. Person making, must be dead.
114. Admissibility of collateral matters in declaration which are not against interest of declarant.
115. Distinctions between rules as to entries made by persons in course of business and as to declarations of deceased persons.

Sec. 107. General Rule.

An exception is also made to the rule in reference to the admissibility of hearsay evidence *in favor of declarations and entries made by deceased persons against their proprietary or pecuniary interest,* unless it can be shown that they were made with a sinister motive.[1] This exception is founded upon the presumption that, where declarations are made under these circumstances, they are entitled to credit, because it is supposed that a person's regard for his own interest is such as to operate as a guaranty against his prejudicing himself by any erroneous statement, and that he would not be likely *fraudulently* to make a statement which would be prejudicial thereto.[2]

Sec. 108. Kinds of Declarations Admitted.

Verbal declarations as well as written are admissible when they are clearly against the interest of the declarant, although, as a

[1] Taylor on Ev. § 464; Short v. Lee, 2 Jac. & W. 464; Higham v. Ridgway, 10 East, 109; Sussex Peerage Case, 11 Cl. & F. 103; St. Clair's Heirs v. Shale, 20 Penn. St. 105; Highley v. Bidwell, 9 Conn. 447; Pike v. Hays, 14 N. H. 19; Smith v. Powers, 15 id. 546; Pearce v. Jenkins, 10 Ired. (N. C.) 355; Thomas v. Degraffenreid, 17 Ala. 602; Smith v. Maine, 25 Barb. (N. Y.) 33; Harris v. Clark, 3 N. Y. 93; Toat v. Finch, 1 Taunt. 141; White v. Chonteau, 10 Barb. (N. Y.) 202; Middleton v. Melton, 10 B. & C. 317; Reece v. Robinson, 15 East, 34.

[2] Phillips on Ev. 304.

matter of course, they are entitled to less weight than those which are in writing, because they are made with less deliberation and are more liable to be erroneously remembered.[3] In a North Carolina case,[4] it was held that the declarations of a deceased person against his interest, such as a verbal statement that he was at a given time indebted to another, were held admissible, and in the cases cited in the previous note, such verbal declarations were admitted without objections. In an English case[5] the question as to the admissibility of such evidence was much discussed, but was not decided; but in many cases in our courts such verbal declarations, where clearly against the interest of the declarant, have been admitted,[6] and, subject to the qualifications before stated, there would seem to be no good ground of objection thereto.

Sec. 109. Conditions Precedent to the Admission of.

In order to render declarations against interest admissible—except in suits to which the declarant is a party—*it must first be shown that he is dead;*[1] and the exception does not apply, even though the declarant has absconded or his whereabouts are unknown, or from any cause the party is unable to produce him.[2]

[3] Pearce v. Jackson, 10 Ired. (N. C.) 355; Ivat v. Finch, *ante;* Sussex Peerage Case, *ante;* Davies v. Pierce, 2 T. R. 53; Strode v. Winchester, 1 Dick. 397; Hallaway v. Rakes, cited 2 T. R. 55.

[4] Pearce v. Jackson, *ante.*

[5] Furdson v. Cloggett, 10 M. & W. 572.

[6] Arthur v. Gale, 38 Ala. 259; Kneeland v. Wilson, 12 Cal. 241; Bollo v. Navarro, 33 Cal. 459; Settle v. Alison, 8 Ga. 301; Waggoner v. Cooley, 17 Ill. 239; Renwick v. Renwick, 9 Rich. (S. C.) 50; Cavin v. Smith, 24 Mo. 22; Jacks v. Hallow, 14 B. Mon. (Ky.) 133; Keener v. Kauffman, 16 Md. 296; Dickerson v. Chrisman, 28 Mo. 134; Morrill v. Foster, 33 N. H. 379; Van Blarcom v. Kip, 26 N. J. L. 351; Denton v. Perry, 5 Vt. 382.

[1] Phillips v. Cole, 10 Ad. & El. 106; Smith v. Whittingham, 6 C. & P. 78. In Spangs v. Brown, 9 B. & C. 935, an action for trover was brought for goods which had been distrained, and the plaintiff insisted that he was the tenant of one John Brown, and not of the defendant; and to establish this fact, showed that he had always paid the rent to John Brown. The defendant, to show that John Brown only acted as his agent, offered the account of payments rendered by John Brown to him. It was held that, John being alive, he should be called, and the account was rejected. Warner v. Price, 3 Wend. (N. Y.) 397; Cutbush v. Gilbert, 4 S. & R. (Penn.) 551; Cluggage v. Swan, 4 Binn. (Penn.) 150.

[2] Stephen v. Gwenap, 1 M. & R. 120; Brewster v. Doane, 2 Hill (N. Y.), 537; Moore v. Andrews, 5 Port. (Ala.) 107. But in Pennsylvania absence from the State has been held equivalent to death. Atton v. Berghaus, 8 Watts (Penn.), 77; Crouse v. Miller, 10 S. & R. (Penn.) 155. And in Massachusetts *insanity* has been held to be equivalent to death. Union Bank v. Knapp, 3 Pick. (Mass.) 36; Holbrook v. Gar, 6

It was at one time supposed that it must also appear that the declarant had a competent or peculiar knowledge of the matters to which the declaration related;[3] but the later and better doctrine seems to be that *it is not necessary that the declarant should have made the statement as of his own knowledge,* but that the absence of such knowledge affects the *weight* and not the admissibility of the evidence.[4]

It is also indispensable that *the statement or entry should be against the proprietary of pecuniary interest of the declarant.*[5] It is not enough that the statements affect the declarant injuriously; *they must also affect his proprietary or pecuniary interest, or they are not admissible.* Thus, in the Sussex Peerage Case,[6] in order to prove the marriage of the Duke of Sussex and Lady Augusta Murray, statements made by the clergyman who had married them at Rome, since deceased, were offered on the ground that they were clearly against his interest, *because they related to an act which*

Cush. (Mass.) 216. And in South Carolina absence from the State seems to be sufficient to let in proof of this class on the handwriting being proved. Elms v. Chevis, 2 McCord (S. C.), 349.

[3] Sussex Peerage Case, *ante;* Barker v. Kay, 2 Russ. 76; Higham v. Ridgway, 10 East, 122; Short v. Lee, 2 J. & W. 475.

[4] Crease v. Barrett, 1 C., M. & R. 925.

[5] Glynn v. Bank of England, 2 Ves. Sr. 38; Roe v. Rawlings, 7 East, 290; Gleadow v. Atkin, 1 C. & M. 424; Berkley Peerage Case, *ante;* Sussex Peerage Case, *ante;* Daves v. Lloyd, 1 C. & K. 276. It is not enough that the deceased was in a situation to know the facts, and if his proprietary or pecuniary interests are not affected, his entries or declarations are not admissible. Thus, in a Connecticut case, Abel v. Fitch, 20 Conn. 90, in which, in a controversy relative to the right of the defendant to maintain a dam at a certain height, the defendant offered in evidence a letter from one Hopkins (then deceased), who, at the time when the dam was raised, was in the defendant's employ as a miller, in which he stated the facts relative to the raising of the dam, as he understood them. The court rejected the evidence, and upon appeal this ruling was sustained, ELLSWORTH, J., saying: "It is nothing more than the opinion of a deceased man, given three years after this dam was built, as to what was its height, he then being miller. * * * Doubtless entries and admissions of deceased people are in some cases admissible, but the evidence now offered does not belong to that class. Entries by persons, since deceased, having full and peculiar means of knowledge, *made at the time, in the regular course of business,* in the usual and proper place and manner, especially *if in the discharge of one's duty,* are admissible as a part of the *res gestae.* So admissions of a deceased man, made against his interest, or by an agent, constituting or qualifying the transaction inquired after, may go to the jury. But the opinion of Hopkins has none of these qualities, nor is it accompanied with any of the safeguards of such evidence. It does not differ from the opinion or remark of any other person deceased, who was acquainted with the subject-matter in controversy."

[6] Sussex Peerage Case, 11 Cl. & F. 110, overruling Standen v. Standen, Peake, 45.

rendered him liable to prosecution, while living, or which, at least, he believed to be illegal. This evidence was rejected, Lord LYNDHURST saying: "It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them. Nor is it true that, because, while living, a party would be excused from answering to certain facts, his declarations as to those facts become evidence after his death. These are not correlative, nor corresponding propositions." Lord BROUGHAM also said: "To say, if a man should confess a felony for which he would be liable to prosecution, that, therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced."[7] The amount of pecuniary interest is not important; *it is sufficient if at the time the declaration or entry was made, it charged the person making it to any extent.*[8]

On the issue whether a conveyance paid for by a parent and taken in the name of a child is an advancement or a gift the declarations of the parent made prior to or at the time of the transfer are admissible. But declarations made subsequent to the transfer and not part of the *res gestae* are not admissible as declarations against interest, as, whether the transaction was a gift or an advancement, in either case the donor lost all interest in the property and the declarations cannot be said to be against interest.[9] The statement of a deceased employee as to his part in starting a fire may be against his pecuniary interest when it furnishes the basis for an action of negligence against him.[10] The declarations of a deceased person to the effect that a certain bank account in his name as trustee was for the benefit of another are admissible.[11] The plaintiff in an action of ejectment may testify

[7] But see Coleman v. Fraser, 4 Rich. (S. C.) 152, where an admission made by a clerk of the defendant that he had stolen a certain sum of money, was held evidence against his principal, because it exposed the clerk to prosecution. See, also, Click v. Hamilton, 7 id. 66.

[8] R. v. Worth, 4 Q. B. 132.

[9] Ellis v. Newell, 120 Iowa, 71, 94 N. W. 463.

[10] Halvorsen v. Moon & Kerr Lumber Co., 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669, and note, page 672.

[11] Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571, 25 A. 487, 33 Am. St. Rep. 944.

to declarations made to her by a deceased person who formerly occupied the land in question to the effect that the deceased person occupied as a tenant of the plaintiff. This evidence was admitted notwithstanding the deceased tenant was not a party to the action under the rule that such declarations are admissible for or against strangers as well as privies.[12]

"When the declaration contains that which is against the interest of the declarant, and also that which is in his favor, its admissibility has been doubted. The settled rule seems, however, now to be that the statements in the declaration should be balanced, and, if those in favor of interest are equal to or preponderate over those that are against interest, the declaration should not be admitted; but that if those against interest preponderate over those that are in favor of interest, the declaration is admissible. But in any case where the declaration is admissible, it is admissible as proof of all the facts therein stated, both the main fact and any collateral fact connected therewith." So a sheriff's memoranda to the effect that he has sold land under a tax execution is a declaration against his interest as laying himself open to all the consequences of a possible illegal sale, and so the statement in it that an execution issued on it on which he made the sale is admissible as part of the statement.[13]

Sec. 110. Entries in Private Books, etc.

The cases in which this exception is most frequently applied, are *where entries have been made by a deceased person in the due course of business; in his private books, of money or property received by him from or for another person,*[1] and such entries are admissible to prove the facts, *even though no privity exists between the deceased and the person against whom the evidence is tendered.*[2] But an account book made by a deceased party is not

[12] McLeod v. Swain, 87 Ga. 156, 13 S. E. 315, 27 Am. St. Rep. 229.

[13] Massee-Felton Lumber Co. v. Sirmans (Ga., 1905), 50 S. E. 92.

[1] Barry v. Babbington, 4 T. R. 514; Doe v. Taylor, 6 Bing. 562; Bree v. Beek, 1 Younge, 225; Edwards v. Rees, 7 C. & P. 340; Rogers v. Allen, 1 Camp. 309; Wynne v. Tyrwhitt, 4 B. & Ald. 376; Manning v. Lechmere, 1 Atk. 453; Harper v. Brooke, Woodeson's Lect. 332; Short v. Lee, 2 J. & W. 464. In Lee v. Va. & Maryland Bridge Co., 18 W. Va. 299, this exception was recognized.

[2] Whitmarsh v. Genge, 3 M. & R. 42; Middleton v. Milton, 10 B. & C. 317. This case overrules Gass v. Wattington, 3 B. & B. 138; Leo v. Va. & Maryland Bridge Co., *ante*.

admissible to prove items not original entries which are evidently summaries or copied from another ledger,[3] or to prove a claim against another when not made in the usual course of business but some years after the transaction had occurred.[4] In many cases such entries may be admissible, although the person making them is still living, where they properly are a part of the *res gestae*.

Sec. 111. Admissibility as against Surety of Declarations of Principal.

In this country many of the courts have adopted the idea that the declarations of the principal may bind in the same sense that those of an agent would, both being within the scope of their business. These words or declarations then are the acts or parts of acts; and it is for the acts of the principal that the surety is bound. In such a view, the principal need not be dead. You prove his entries or declarations the same as you do his other acts by a third person; and that without reference to the fact that he can be produced as a witness. In a Pennsylvania case[1] the defendant was surety for the good behavior of Cobbett, the editor. It was shown that a libel (a volume of "Porcupine") was paid for to Cobbett's common clerk, and this was admitted as the act of Cobbett. This case shows the principle. Here was the act of Cobbett by his agent. On this distinction the entries of a teller of a bank in a book kept in the bank, by which he daily stated his

[3] Harmon v. Decker, 41 Or. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748.

[4] Rowan v. Chenoweth, 49 W. Va. 247, 38 S. E. 544, 87 Am. St. Rep. 796.

Thus, in an English case, Whitmarsh v. Genge, 3 M. & R. 42, in an action upon a bond given for the fidelity of a clerk, to the plaintiffs, in paying money and all his dues, it was shown that it was his duty to keep their books. He kept the books and entered therein the moneys received by him, and died. In admitting the entries as evidence against the sureties upon the bond, Lord TENTERDEN laid great stress upon the circumstance that the clerk was dead. But, inasmuch as these entries were made by the clerk in the line and as a part of his duty, it is clear that they were also admissible as a part of the *res gestae*. In another case, Middleton v. Milton, 10 B. & C. 317, a collector's private book by which he collected and ticked off the sums paid, was offered in evidence. Several receipts given by the collector to private persons, for taxes paid by them, were produced, and the whole duly proved, the private books being seen with his family at the time of his death. All the entries and receipts were shown to have been in the usual line of business of the deceased in his office of collector, and the whole were received against his surety, on the ground that the entries were made by a deceased person against his interest. Plaxton v. Dare, 10 B. & C. 17.

[1] Respublica v. Davis, 3 Yeates (Penn.), 128.

account, as teller, were received against him, to show his default in a suit against his surety. But his admissions, made in writing, after he was dismissed from his office, were denied by several of the judges. The former were likened by CHEVES, J., who delivered the opinion of the court, to the declarations of an agent within the scope of his authority, which are a part of the *res gestae;* the latter to an agent's admission after he had ceased to act for his principal.[2] The court did not stop to inquire whether the teller was dead or alive. On the same principle, a jailer's receipt for a prisoner was held receivable against his surety.[3] So, a statement of an account with the bank by a cashier, explaining its receipts and defaults, made before his office terminated; for the sureties "were bound, not for themselves, but for *him;* and *his acts* and sayings of course bound them, and they must stand or fall by them."[4] So, the return of a sheriff that a *fi. fa.* is satisfied, is a declaration concluding his sureties in an action on their bond.[5] And so, on the same principle, the inventory of an administrator is evidence in an action against his sureties.[6] Several of these declarations are obviously parts of the transactions for which the sureties are bound; and that is the true point of inquiry. They are like a part payment by the principal on a promissory note, which has been held to take it out of the Statute of Limitations, or to repel the presumptive bar of twenty years' delay in respect to the surety, who is jointly bound to pay.[7] The surety is bound that he shall do the very act which he is performing, to wit, payment, as the sureties were that the cashier should do his duty by passing accounts at the bank. Whereas, the mere acknowledgment of the principal with whom a surety is bound in a promissory note, has been held not to affect the latter; for such acknowledgment cannot be placed within the scope of the suretyship. The case of joint debtors, where both are principals, stands on a different footing; for they bind each other in respect to their joint interest, as *quasi* partners.[8] But after the lapse of

[2] State Bank v. Johnson, 1 Const. Rep. (S. C.) 404.

[3] Barnard v. Com., 4 Litt. (Ky.) 148.

[4] Pendleton v. Bank of Kentucky, 1 Mon. (Ky.) 171.

[5] Governor v. Twitty, 1 Dev. (N. C.) 153.

[6] Chairman, &c., v. Harramond, 4 Hawks (N. C.), 339.

[7] Hunt v. Bridgman, 2 Pick., (Mass.) 584.

[8] Baker v. Briggs, 8 Pick. (Mass.) 122; Longenecker v. Hyde, 6 Binn. (Penn.) 1.

six years, the admission of the principal cannot be received against the surety, even to take the case out of the Statute of Limitations.[9]

But there is a class of cases in our courts in which the admissions, declarations or acknowledgments of the principal, in this respect, are held to be admissible. Thus, in an early Pennsylvania case[10] the defendant had written to the plaintiff, offering to stand jointly bound with one Wilson for all contracts he might make. Subsequently Wilson sent a letter to the defendant, giving a statement of what he had purchased under the guaranty, and the plaintiff relied upon this letter to prove the contract and fix the amount, and it was admitted as evidence.[11] But in an Iowa case[12] a letter written by the principal in a written obligation containing a statement of admissions made by the surety, was held not to be admissible in an action against the surety.

[9] Meade v. McDowell, 5 Binn. (Penn.) 195.

And where the plaintiff took one Burnett in as a partner in the business of tanning, and the defendants covenanted with the plaintiff that Burnett should faithfully discharge his duty, as such partner, for two years from the 11th of January, 1833, in an action on the covenant, assigning breaches in 1823, admissions made by Burnett in 1825, that certain books offered by the plaintiff in evidence were the books of the firm, were held inadmissible against his sureties. "True," says HODMAN, J., delivering the opinion, "that while the principal is acting, his declarations may be so interwoven with his acts as to stand in direct connection with them, and form a part of the *res gestae;* but when he ceases to act, his subsequent declarations have no direct connection with his preceding acts, so as to bind his sureties." Hotchkiss v. Lyon, 2 Blackf. (Ind.) 222. So, to implicate the surety of a sheriff, his acknowledgment that he had collected money was denied as evidence, though it was said by HOLMAN, J., "If this had been while he was officially acting in relation to the receipt of the money, the statement would have formed a part of the *res gestae.* But declarations at any subsequent period are inadmissible. It is his *acts,* and not his admissions or declarations, for which the sureties are bound." Shelby v. Governor, 2 Blackf. (Ind.) 289; Beal v. Beck, 3 H. & McH. (Md.) 242. In Evans v. Beattie, Evans v. Beattie, 5 Esp. 27, in an action against a guarantor of the sale of goods, Lord ELLENBOROUGH, C. J., rejected evidence of an admission by the principal that he had received the goods. "The stipulation," said he, "*was, to pay for goods received,* not for goods *acknowledged* to have been received." The ground upon which this decision rests is, that the principal is not the general agent of the surety, so that he can bind him by a subsequent acknowledgment respecting the goods furnished. Bacon v. Chesney, 1 Starkie, 192.

[10] Meade v. McDowell, 5 Binn. (Penn.) 195.

[11] See, also, Fenner v. Lewis, 10 John. (N. Y.) 38, where the admissions of a wife that she had received certain property for her husband, were held admissible. Simonton v. Boucher, 2 Wash. (U. S. C. C.) 473; Treasurers v. Bates, 2 Bailey (S. C.), 302, which seems to be directly opposed to the doctrine of State Bank v. Johnson, *ante.*

[12] Root & Sons Music Co. v. Caldwell, 54 Iowa, 432.

In all cases, entries or reports made by a principal in the due course of business, or which it is his duty to make, are admissible in an action against his surety,[13] but are held not to be conclusive upon him.[14] The term "declaration," as applied to the exception which we are considering, embraces *all written statements, whether made at the time of the fact declared or at a subsequent day,*[15] which are against either the *proprietary or pecuniary interest of the person making them.*

Sec. 112. Illustrations of the Application of this Exception.

Entries, in the books of a corporation, of a collector of taxes, an agent, steward, bailiff, receiver, etc., subject to the inspection of others, charging the party making it with money or property received, come clearly within the exception, as also do entries in private books kept solely for the convenience of the owner, and in his custody; and such entries are admissible, although they form only a part of a general debtor and creditor account, the balance of which is in favor of the receiver,[1] because, to the extent of such entries, the admission is against the interest of the party making them, and the balance in his favor would be diminished to that extent. The question as to whether an entry made by a person, acknowledging the payment of money as due to himself, is admissible as a declaration against interest in cases where such entry is itself the only evidence of the charge of which it shows the subsequent liquidation, is one upon which the authorities are conflicting,[2] but the weight of authority seems to be decidedly in favor of its admission.[3] In an action for the recovery of money, against the administrator of a bailee, a memorandum book offered

[13] Stern v. People, 102 Ill. 540.

[14] Obning v. Evansville, 66 Ind. 59, overruling State v. Grammer, 28 id. 530; State v. Pruther, 44 id. 287, and disapproving Baker v. Preston, Gilmer (Va.), 235.

[15] Doe v. Surnford, 3 B. & Ad. 898; Short v. Lee, 2 J. & W. 475.

[1] Williams v. Graves, 8 C. & P. 592; Clark v. Wilmot, 1 Y. & C. 53; Rowe v. Brenton, 3 M. & Ry. 267; R. v. Worth, 4 Q. B. 134.

[2] Doe v. Vawles, 1 M. & Rob. 261, and Doe v. Burton, 9 C. & P. 254, held that such entries are not admissible; while R. v. Hendon, cited *arguendo* in 9 C. & P. 255, and R. v. Lower Hayford, cited 2 Smith's Leading Cases, 194, *n.*, held that they are. See Calloway v. McMillan, 11 Heisk. (Tenn.) 557, where entries in a decedent's book of payments made by him *to* the plaintiff were held to be inadmissible, as they were neither entries against interest or in an official employment.

[3] 2 Smith's Leading Cases, 194; R. v. Hendon, cited 9 C. & P. 255; R. v. Lower Hayford, 2 Smith's Leading Cases, 194, *n;* Higham v. Ridgway, 10 East, 109.

by the defendant and admitted in evidence was proved to be in the handwriting of the bailee, and it was shown that the entries were contemporaneous with the occurrence of the transactions. It was held that these memoranda were in the nature of a statement by a trustee of his doings as such. They charged him with various matters, and most of the entries were against his own interests. Hence the entries, though not conclusive, were evidence for the jury to consider.[4]

So, too, memoranda made by a sheriff, in a book kept by him for that purpose, are admissible as evidence in a suit between third parties, after the death of the sheriff, where the entries were made in the course of his official business, and were against his interest at the time.[5] The fact that a person who made entries in a ledger was not a clerk in the store, but was employed merely to post the books of the party offering them in evidence, cannot exempt such evidence from the operation of the general rule which permits entries made by a person against his interest to be offered in evidence. Thus, where the plaintiff offered in evidence his original ledger book, containing entries in the handwriting of the defendant's testator, and afterwards his day-books, containing daily entries against deceased and other parties, but all in the handwriting of the testator, it was held that although these entries would not have been admissible for the purpose of charging a third person, because made by a clerk in the ordinary discharge of his duty, and contemporaneous with the transactions to which they related, yet they were admissible as declarations or admissions made by the party against his interest.[6]

Sec. 113. Person Making, must be Dead.

The turning point in the admission of this class of entries is, that the person who made the entry is dead. Being dead, the entry in discharge proves not only the simple fact of payment, so as to extinguish the debt, but may be received to every incidental matter stated in the declaration. Thus, the entry in the books of the midwife proved not only the payment, but the time of the

[4] Gaines v. Gaines, 39 Ga. 68; Buckley v. Buckley, 12 N. W. 423. In State v. Castle, 79 N. C. 34, it was held that to render business entries of deceased persons admissible, the evidence that they were original and contemporaneous must be extrinsic.

[5] Field v. Boynton, 33 Ga. 239.

[6] Ward v. Leitch, 3 Md. 326.

birth.[1] The entry of a deceased attorney of the payment to him of a part of the judgment, proved not only the payment, but by whom it was made, and on what account, distinguished between the principal and the surety.[2] But the rule is otherwise where the declarant is alive.[3]

[1] Higham v. Ridgway, 10 East 109.

[2] Thompson v. Stevens, 2 N. & McCord (S. C.), 493.

[3] Thus, in an action by one surety against another, for contribution of money paid by one plaintiff on a bond to West and others, after the plaintiff had proved the payment, the defendant insisted that, before the plaintiff had paid, the principal had discharged the debt, so that the plaintiff had paid in his own wrong. To show the previous payment, the defendant proved that the principal had paid money to the obligees, and then offered to prove the admission of West, one of the obligees, that such payment had been made on account of the bond. It was objected that West should be called, and the objection sustained. PARKE, J., remarked that what West said at the time of the payment might be received as a part of the *res gestae;* but any declaration made after payment, upon what account he received the money, is no evidence against the plaintiff. His unsworn declaration cannot bind any interest of the plaintiff. Dunn v. Slee, Holt N. P. 399. And a mere oral declaration of this character, coming from the creditor, even after his decease, would be inadmissible. In a like action for contribution, the defendant offered to prove, by the creditor's acknowledgment, she being dead, that the defendant had paid $300 of the money as surety. This was offered in order to reduce the amount of contribution. The fact of payment, or by whom, or on what account made, was not offered to be proved in any other way. The evidence was rejected as hearsay. The court said such admissions ought not to be received at all, except against the party making them, or those claiming under him. Thomas v. Thomas, 2 J. J. Mar. (Ky.) 60. In a similar action, a receipt for the moneys, signed by the attorney on record, of the creditor who had sued and obtained judgment against the sureties, was denied as evidence between the latter, though offered merely to show the payment of the money, the attorney being still alive. Warner v. Price, 3 Wend. (N. Y.) 397. The receipt was obviously no better evidence than if made by the party instead of his attorney; it would be *prima facie* evidence against the former, but as between the sureties, or between them and their principal, was no more than a written statement, without oath. When a letter of the alleged receiver of goods on commission was produced against the defendant, who was sued for having fraudulently recommended the receiver as credit-worthy, acknowledging the delivery of the goods, it was rejected, TILGMAN, J., saying: "Collusions might be formed between plaintiffs' and their witnesses, who might easily be induced to make declarations in letters which they would be afraid to verify on oath in open court." Longenecker v. Hyde, 6 Bin. (Penn.) 1. In assumpsit for goods sold to defendant's wife, who was entitled to a separate maintenance payable by the defendant to trustees, the material question was, whether the maintenance had been regularly paid. To show this, the receipts of the trustees were offered in evidence by the defendant. Held inadmissible; and, *per curiam*, "A man's receipt is not evidence to prove a payment against a third person. Those who gave the receipts should have been called." Cutbush v. Gilbert, 4 S. & R. (Penn.) 551. In trover for goods distrained, the plaintiff insisted that he was tenant of John Brown, and not of the defendant, Hugh Brown; and showed that the payment of rent had always been to John. To show that John had received the money as the de-

The general rule, therefore, is, that certificates, receipts, or other admissions of payments, made by persons other than the party to the suit in which they are offered, cannot be received; but such payments must be proved by a witness.[4] Accordingly, the certificate of a living surveyor, that he had received his fees of survey, being offered to affect a party in a suit with which the surveyor had no concern, was held inadmissible. And the admission of the plaintiff's agent to collect the money, that he had made the collection, is no evidence against his principal.[5]

fendant's agent, the latter offered John's account of the payments rendered by him to the defendant. Held that John, being alive, should be called; and the account was rejected. Spargo v. Brown, 9 B. & C. 935.

In another action it appeared that one Beaman had, with three others, signed a note to the Bank of Rutland. He insisted that he was their surety; and to prove that he paid the money, produced and offered in evidence the receipt of the cashier, indorsed on the note, stating that he had paid the money. The judge refused to receive this as evidence either of payment or of the person who paid, there being no proof that the cashier was dead; indeed, it was admitted that he was living, and but a little way off. And afterwards, on motion for a new trial, the judge refused it. Beaman v. Cushman, Washington Circuit, June, 1833, before COWEN, Circuit Judge.

[4] Cluggage v. Swan, 4 Binn. (Penn.) 150.

[5] Davis v. Whitesides, 1 Dana (Ky.), 177.

It cannot be denied, however, that the rule has been departed from in one or two cases. Thus, where one Sherman authorized Crosby to settle a suit brought against the former by Bennet, and pay the money to be found due on the settlement, in a suit between the two former, wherein Crosby claimed the money as paid by him on the settlement, a receipt for the money as paid on the judgment in the cause, signed by Bennet, was admitted as evidence of the settlement and payment, to charge Sherman. Sherman v. Crosby, 11 John. (N. Y.) 70. The court say the receipt was *prima facie* evidence of the demand and payment; and it lay with Sherman to impeach it. Of this case it should be remarked that there was no pretense that Bennet was not alive, and within the jurisdiction of the court. He stood as creditor, and Crosby paid the money to him at the request of Sherman. The amount of the decision is, that in all actions for money paid, the receipt of the payee, though he be alive, shall be admissible to charge the defendant with the fact of payment. Bennet was not an agent, nor a joint party with Sherman, either on the record or as having a common interest; the receipt might or might not have been a part of the *res gestæ*, but the latter did not appear, for no act was shown to which the written declaration would attach. To put it on the latter ground would, therefore, be a plain instance of the *petitio principii*. In a word, there seems to be no instance, if we except the next case, *infra*, within which Sherman v. Crosby can be brought. It would operate to reverse the entire rule laid down by TILGHMAN, C. J., in Cluggage v. Swan, *supra*. Receipts and certificates of private persons would become substitutes for their sworn testimony. In actions for money paid, this new kind of written evidence would be the universal, because the ready, medium of proof, which may, according to TILGHMAN, C. J., *supra*, be collusively introduced; and, we may add, amended, like a notary's certificate to charge an indorser, or a justice's exemplification of his proceedings, till it shall be full and plain to the purpose. It would be a convenient mode of proof for fraudulent purchasers of property, under pre-

Sec. 114. Admissibility of Collateral Matters in Declaration which are not against Interest of Declarant.

The rule seems to be that, where an entry is against the interest of a person making it, he being dead, *it may be used as evidence of collateral and independent matters, which, although not strictly against the interest of the declarant, yet form a part of the transaction.* Thus a sheriff's memorandum to the effect that he has sold land under a tax execution is a declaration against his interest as laying himself open to all the consequences of a possible illegal sale, and so the statement in it that an execution issued on it on which he made the sale is admissible as part of the statement.[1] Thus the entry in an accoucheur's book[2] was held admissible to

tense of having paid large debts for the insolvent, or paying him a large consideration. Both the time and the amount of payments are generally of great consequence in such cases; and the strictest rules of evidence can with difficulty guard against imposition. In another case the plaintiff sued for passage money to Europe, paid for the defendant's testator, and the captain's oral admission, made about the time the testator sailed, was received as proof of the payment. The captain was dead, and the court below put it on this ground. On error, the court repudiated that principle, and said, whether the captain was dead or alive, the testimony was admissible, being made by one able to bind himself by a receipt or acquittance, and made too about the time of the testator's sailing. If it were to stand on the ground of the captain's death, perhaps the court would require that it should have been in writing. Holladay v. Littlepage, 2 Munf. (Va.) 314. This is doubtless a safer case than Sherman v. Crosby. The captain being dead, it wants only the form of a written entry to bring it within the English rule. But whether dead or living, the oath of the hearer could fix the time when the declaration was made; and prevent imposition in that particular. This case, however, fails as to any support from the declaration being a part of the *res gestae*. Proof *aliunde* that money was paid, and that the declaration was contemporaneous with the payment, would alone give it that character, so as to bring it within the suggestion of PARKE, J., in Dunn v. Slee, *supra*. It seems also to fail in support from any adjudged case founded on the declarant's death; for we believe not one has gone the length of saying that oral declarations of a person, however much it may militate against his interest, shall be received merely upon the ground that he is dead. Not only must the declaration be written, but its introduction has generally been accompanied with circumstances calculated affirmatively to repel suspicion that it may have been simulated.

[1] Massee-Felton Lumber Co. v. Sirmans (Ga., 1905), 50 S. E. 92.

[2] In Higham v. Ridgway, *ante*. See, also, Warren v. Greenville, 2 Strange, 1129. In Nourse v. McCoy, 2 Rawle (Penn.), 70, the account book of a deceased magistrate, showing charges for taking of three other deeds on the same day and no charge for the one in question, was held to be admissible upon a trial of a person for forgery of a deed which purported to have been executed by the person making such acknowledgments before the same magistrate, upon the ground that as *res gestae* they afforded a presumption as to other facts, and that an *omission* in a course of usual entry is often as strong a fact as an entry.

prove the age of the child deceased, the entry containing a statement of the accoucher's attendance and his charge therefor, and being marked "paid." In this case the entry would not have been admissible, except for the entry of "paid," which brought it within the rule, as being against interest; Lord ELLENBOROUGH, in answer to the argument that only that portion of the entry containing the word "paid" could be used, saying, "It is idle to say that the word "paid" only shall be admitted in evidence without the context, which explains to what it refers; we must therefore look to the rest of the entry to see what the demand was which he thereby admitted to be discharged." And this principle has been acted upon in many cases since.[3] But it must be remembered that, in order to make entries against interest evidence of independent matters, *there must be a direct connection between the entries and the matters they are sought to establish, and such entries can have no bearing upon matters separate and distinct therefrom.*[4] In other words, an entry which is admissible after the maker's death, because made in the course of business, is evidence of those things only which, according to the course of that business, it was the duty of the deceased person to enter. In an early English case[5] the plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the drayman came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names, and that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery. Otherwise of the shop-book itself singly, without more. According to the English cases, if the drayman had notified a clerk or book-keeper of the plaintiff of the delivery of the beer, and the latter had made the entry, it would not be admissible, because it would

[3] Marks v. Lahee, 3 Bing. N. C. 408; Davis v. Humphrey, 6 M. & W. 153; Doe v. Robson, 15 East, 32; Slead v. Heaton, 4 T. R. 669; Leter v. Warren, 5 Q. B. 773. In Heath v. West, 26 N. H. 191, on a question of minority, the charge of an accoucheur for his services, and his testimony that it was correctly made at the time, was held to be evidence, although he did not recollect the date.

[4] Knight v. Waterford, 4 Y. & C. 283.

[5] Price v. Torrington, 1 Salk. 285.

then be an entry predicted upon mere hearsay,[6] and there can be no question as to the soundness of this rule. A written statement of a fact which the person making knew nothing about, except what he has heard from others who did, or pretended to, know, is no better evidence than any ordinary hearsay. The circumstance that it is written gives it no additional character or value. It was in its inception, and must always remain, mere hearsay. But such an entry is admissible if the person reporting the facts embraced therein is produced and testifies to the correctness of report,[7] as it is immaterial how the truth of the facts stated in the entry is proved, provided it *is* proved. In a Connecticut case,[8] in an action for goods sold, the account books of the plaintiff, containing a charge of the goods to the defendant, made in the regular course of business, are admissible in support of his claim; and it does not affect the question of their admissibility that the entry was made by the plaintiff upon information of the sale given him by a salesman in his employ, who had sold and delivered the goods at a distant place; nor the fact that the delivery of the goods is admitted, and the only question is whether they had been purchased by the defendant or only taken to be sold on a commission. The circumstances in which an entry was made, so long as it was made in the regular course of business, affect only its weight as evidence. The fact that it is or was the custom of a person to enter certain matters in his book, they not being

[6] Brain v. Preece, 11 M. & W. 773. The application of this branch of the rule is well illustrated by the case last cited. Brain v. Preece, 11 M. & W. 773. In that case, in an action for the price of coals which had been sold at the pit's mouth, an entry was rejected which appeared to have been made in the following manner: In the ordinary course of business it was the duty of one of the workmen at the pit, named Harvey, to give notice to the foreman of the coal sold; and the foreman, who was not present when the coal was delivered, and who was unable to write, used to employ a man named Baldwin to make entries in the books from his dictation. Baldwin read over these entries every evening to the foreman. At the time of the trial Harvey and the foreman were dead, and Baldwin was called to produce this book, with the view of proving thereby the delivery of the coal in question; but the court held that it was inadmissible. The ground of this decision appears to have been, that, although the entries, being made under the foreman's direction, might be regarded as made by him, yet, inasmuch as he had no *personal knowledge* of the facts stated in them, but derived his information at second hand from the workman, there was not the same guaranty for the truth of the entries as might be found where the party making the entry had himself done the business, a memorandum of which he had inserted in his book.

[7] Payne v. Hodge, 71 N. Y. 598.

[8] Smith v. Law, 47 Conn. 431.

against his interest, and it not being his duty to enter them, does not render the entry admissible. Thus, in an English case,[9] it became necessary to show that a contract of service had been for less than a year; and, in order to do this, proof was given that the employer, who was dead, had in the course of his business been in the habit of hiring farm servants, and that his practice, when he did so, was to enter the time and terms of such hiring in a book kept by him for that purpose. This book, which contained entries of the service in question, and showed that the servant had been engaged for half a year only, was tendered in evidence; but the court held that it was inadmissible, on the ground that, although it might be the practice of the master to make such entries, it was not his *duty* to do so.

Sec. 115. Distinctions between Rules as to Entries made by Persons in Course of Business, and as to Declarations of Deceased Persons.

In many respects the rules which regulate the reception of entries made by deceased persons are the same as those which prevail with respect to declarations against interest. For instance, the death,[1] the handwriting, and the official character of the person who made the entry must be proved; and it should further appear that he had no motive to misstate. In some particulars, however, there is a marked distinction between the two classes of cases. Thus, in order to render admissible entries made in the course of office or business, they must, unlike declarations against interest, be proved to have been made *contemporaneously with the acts which they relate.* "It is to be observed," said PARKE, B., "that in the case of an entry against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made it is admissible; but in the other case (of an entry made in the course of business) *it is essential to prove that it was made at the time it purports to bear date;* it must be a contemporaneous entry."[2] In using the word "contemporaneous," *it is not meant that the entry must have been made at the immediate time of the occurrence;*

[9] R. v. Worth, 4 Q. B. 132.

[1] See Cooper v. Marsden, 1 Esp. 1, *per* Lord KENYON.

[2] Doe v. Turford, 3 B. & Ad. 897; Poole v. Dicas, 1 Bing. N. C. 654.

but it will be sufficient if made within so short a time after as reasonably to be considered part of the transaction. Thus, if the business is done in the morning, and the entry is made in the evening of the same day,[3] or perhaps even on the following morning,[4] it will be sufficient; though, where several intermediate days had elapsed between the date of the transaction and the time of inserting an entry of it in the book, the evidence has been rejected;[5] and in one case the interval of a single day was held to constitute a valid objection.[6] So, too, as we have seen, declarations against interest are often admissible to prove *independent matters,* which, though forming part of the entry, are not in themselves against the interest of the declarant. A stricter rule, however, prevails with respect to official or business entries, and it may be said that *whatever effect may be due to an entry made in the course of office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances.*[7] Thus, where it became necessary to show in what

[3] Price v. Torrington, 1 Salk. 235; Ray v. Jones, 2 Gale, 220; Curren v. Crawford, 4 S. & R. (Penn.) 3, 5.

[4] Ingraham v. Bockins, 9 S. & R. (Penn.) 285.

[5] Forsythe v. Norcross, 5 Watts (Penn.), 432.

[6] Walter v. Bollman, 8 Watts (Penn.), 544.

[7] Chambers v. Bernasconi, 1 C., M. & R. 368. In Mississippi it is considered to be a settled principle of the common law, that a memorandum of one who knew the fact, had no interest to falsify it, and which was made by him as a public officer in the regular course of his business as such, he being dead, is admissible evidence; and accordingly the written entry or memorandum of a deceased notary, as to demand and notice, in case of promissory notes, was held admissible. Ogden v. Glidewell, 6 Miss. 179; Bodley v. Scarborough, id. 729.

In Maine, Augusta v. Windsor, 19 Me. 317, in assumpsit for charges incurred by the plaintiffs on account of a pauper properly chargeable on the defendants, it became important to show *at what time* one Linscott had *had his leg broken;* and for the purpose of fixing the *date,* the plaintiffs offered in evidence a day-book of Dr. Neal, of Gardiner, containing two charges against Linscott, one dated Sept. 28, 1821, and the other, Sept. 29 of the same year, for reducing a fracture in his leg and for medical attendance. It was further proved that Dr. Neal attended and set Linscott's leg; that he died in 1839; that he was a regular practicing physician in 1820 and 1821; and that the book introduced was in his handwriting. The evidence was held admissible. And in a later case it was held that contemporaneous entries by third persons in their own books in the ordinary course of business, where the matter is within their knowledge and there is no apparent motive to pervert the fact, are evidence. Dow v. Sawyer, 29 Me. 118.

In Alabama it is held that books of accounts kept by a deceased clerk, and other entries or memoranda made in the course of business or duty, by any one who would at the time have been a competent witness to the fact which he registers, are admissible evidence; and that if the

place the plaintiff had been arrested, and in order to do this, a certificate of a deceased sheriff's officer, which had been returned by him to the office in the ordinary routine of his duty, and which specified, among other circumstances connected with the arrest, the spot where it took place, was tendered in evidence. The court, while admitting that the certificate was evidence of the arrest itself, as also of the day when it was made, since it might be necessary for the officer to make known these facts to his principal,—were all clearly of opinion that it could not be received to show the particular spot where the caption took place, that circumstance being merely collateral to the duty done. This decision turned on the circumstance that the sheriff's officer was going beyond the sphere of his duty when he made an entry of the *place* of arrest, and that such an entry therefore had no claim to be received as evidence of that fact.

book containing the original entry has been destroyed or lost, a copy, proved by the oath of a person who copied it, is admissible; and accordingly a sworn copy, from the book of a deceased warehouseman and weigher, of an entry of the weight of some bales of cotton, the book itself having been destroyed in a fire, was decided to be admissible in a suit between third parties. Batre v. Simpson, 4 Ala. 306; Brown v. Steel, 14 Ala. 63.

CHAPTER XI.

Memoranda.—When May be Evidence.

Section 116. How may be used as evidence.
117. Should be made by witness.
118. May be used, although its contents would not be admissible.
119. Witness need not have recollection independent of.
120. When the opposite party is entitled to see the memorandum.
121. Memorandum itself only admissible, when.
122. Memorandum in which party can have no interest to falsify.
123. Minutes of testimony of deceased witnesses.

Sec. 116. Memorandum, how may be used as Evidence.

Memoranda of facts and circumstances, made by an eye witness, at the time of the occurrence, *and which he swears to be correct,* are not generally admissible in evidence,[1] except where they are made in the due course of business, and the person making them is dead,[2] and they are properly authenticated. Thus on the

[1] People v. Elyea, 14 Cal. 144; Gilmore v. Wilson, 53 Penn. St. 194; Carr v. Stanley, 7 Jones (N. C.) L. 131; Urkett v. Coryell, 5 W. & S. (Penn.) 60; Tandy v. Masterton, 1 Bibb (Ky.), 330. "Check slips" made in the regular course of business in transhipping goods from one car to another are admissible to aid a witness making them, in recollecting the number of the cars. Shriedley v. State, 23 Ohio St. 130. The certificate of a physician who examined a person for an insurance upon his life is admissible in evidence, when he acted by the consent of both parties as examiner, although he was not the regular examining surgeon of the company, because in such a case his certificate partakes of the nature of an original document. Mutual Benefit Life Ins. Co. v. Cannon, 48 Md. 264. See, also, Bailey v. Burchard, 62 Me. 168, where a sealed bill made by the person agreed upon as the parties to make it was held admissible, although not sustained by the oath of the person making it, there being no proof that any omissions were made or that any fraud was practiced. Private memoranda made by a person in a pass book or elsewhere are not admissible in his favor. Golding v. Orcutt, 44 Vt. 541. Nor are newspaper accounts of what a person said upon the occasion of the happening of an injury to him through a railway casualty. Downs v. N. Y. Central R. R. Co., 47 N. Y. 82.

[2] Bank of United States v. Davis, 4 Cr. (U. S. C. C.) 533. In Welsh v. Barrett, 15 Mass. 380; North Bank v. Abbott, 13 Pick. (Mass.) 465; Shone v. Wiley, 18 id. 558; and Washington Bank v. Prescott, 20 id. 339, such entries were held admissible, not only when the messenger is dead, but also when he has absconded, or from any cause his testimony cannot be obtained. But see Avery v. Avery, 49 Ala. 193, where the true rule is stated to be that a memorandum made by a person deceased is only admissible when made by him in the due course of business,

issue as to the location of a deceased grantor of a deed on a certain day his diary showing what he did on that day is inadmissible without identification and without proof that it was written at the place and on the day that it was purported to be written.[3] A tabulated statement may be admissible in evidence when drawn up by competent persons taken from voluminous and complicated papers in evidence made for the purpose of assisting the jurors in arriving at their verdict.[4] The theory of the law deducible from the books seems to be that a memorandum is but secondary evidence of the facts of which it speaks, the primary evidence being the knowledge of the witness, if he is able to testify truly as to the facts mentioned, or if he is enabled to testify from present recollection after having had his mind quickened by the memorandum —that is to say, of his own knowledge, independent of the memorandum; and it is only when this primary proof is not available that resort may be had to the secondary, so that it becomes necessary to show that the witness cannot speak from knowledge of the facts, or from present recollection thereof, after having consulted the memorandum, before it can become of evidentiary value, either as auxiliary or an aid to the mind in speaking from it. But to enable a witness to testify from the memorandum, under the conditions stated, it must be the original, unless it be lost, or its absence excused. If the original be produced, and it appears that it was made in the usual course of business, it may be introduced and received in evidence along with the testimony of the witness who made it, and is enabled to say that the facts stated in it were correctly minuted at the time; but this is because he has for-

and as to facts to which, if living, he would be competent to testify. Contemporaneous entries of acts and occurrences, as well as copies of instruments, if made in the course of business, or where they would naturally be looked for, are often received as evidence, especially where they are sustained by other evidence. Briggs v. Henderson, 49 Mo. 531. Entries made upon a bill of lading made by agents of a railroad company, whose duty it is to indorse thereon the condition of the goods when received, are held to be admissible in Georgia. Evans v. Atlanta, &c., R. R. Co., 56 Ga. 498. See, also, Kerr v. Ferrish, 52 Miss. 101, where a pencil memorandum upon an official register or list of lands designating one lot as having been sold to K., was held admissible as tending to support the title of one claiming under K. In Cabat v. Walden, 46 Vt. 11, a book containing an account of expenditures of overseers of the poor, *which it was their duty to make*, was held to be admissible in favor of the town to prove such expenditures.

[3] Elliott v. Sheppard, 179 Mo. 382. 78 S. W. 627.

[4] State v. Brady, 100 Iowa, 191, 69 N. W. 290, 62 Am. St. Rep. 560.

gotten, so that he is unable to speak concerning such facts without the aid of the memorandum. Memoranda made in the usual course of business, when made up from reports of subordinates, are admissible, under the rule, when accompanied by the testimony of such subordinates that they represent truly what had transpired, combined with that of the person minuting the transactions that they were also noted; but not so with merely private memoranda, not made in pursuance of any duty owed by the person making them.[5] So memoranda made by a deceased sheriff, in a book kept by him for that purpose, were held to be admissible in a suit between third parties, where the entries were made by him in the course of his official duty, and were against his interest at the time.[6] So, when the identity of lands sold for taxes as unseated is in question, manuscript books containing memoranda signed by various persons who had been deputy surveyors, found in the office of a deceased deputy surveyor, are admissible if they appear to be such memoranda as the deputy surveyors ought, by the nature of their duty, to have made.[7] But where three persons united to make an inventory of a stock of goods the inventory itself is not admissible as a memorandum in the absence of the supporting testimony of all of the three persons making it.[8] But while memoranda made by a person who is still living are not admissible, for want of being verified on oath or its equivalent, or traceable to the party against whom it is offered, the benefit of its *permanence* is not always lost to justice. Thus a witness who has drawn up a written narrative, or made a written memorandum of a matter or transaction, may in many cases use it while under examination as a script to refresh his memory.[9] Thus

[5] Manchester Assur. Co. v. Oregon R. & Nav. Co. (Ore., 1905), 79 Pac. 60.

[6] Field v. Boynton, 33 Ga. 239. A written memorandum, made by an officer in the course of his official duty, which is against his interest, is admissible after his death, as well of the facts against his interest as of other collateral and incidental facts and circumstances contained in it, and that, too, irrespective of the question whether any priority exists between the officer and the other party against whom it is offered. Livingston v. Anoux, 56 N. Y. 507.

[7] Russell v. Werntz, 24 Penn. St. 337.

[8] Whitley Grocery Co. v. Roach, 117 Ga. 918, 42 S. E. 282.

[9] Hottle v. Weaver, 206 Penn. 87, 55 A. 838; Sandwell v. Sandwell, Comb. 445; Holt, 295; Church v. Perkins, 3 T. R. 749; Burton v. Plummer, 2 Ad. & El. 341; Beech v. Jones, 5 C. B. 696; Smith v. Morgan, 2 Moo. & R. 257; 2 Phill. Ev. 480, *et seq.*, 10th ed.; Dyer v. Best, 4 H. & C. 189; Howland v. Willetts, 5 N. Y. 219; Huff v. Bennett, 6 N. Y. 237; Halladay v. Marsh, 3 Wend. (N. Y.) 142; Green v. Disbrow, 7 Lans. (N.

a witness may refer to his account books, or his cash book,[10] or to letters written by himself relating to the transaction,[11] or even to a bill of particulars or memorandum not made by himself, if upon

Y.) 381; Gilbert v. Sage, 5 id. 290; Marclay v. Shultz, 29 N. Y. 351; Philbin v. Patrick, 6 Abb. Pr. (U. S.) 284. The English rule is, that a witness may use a memorandum, or any book or paper, to refresh his memory if he can afterwards swear to the fact from recollection; but if he cannot so swear otherwise than as finding it in the book, then it must be produced. Manghan v. Hubbard, 2 M. & Ry. 5. In this country, however, a memorandum is never evidence *per se* of the facts stated in it, but may be used by the witness to refresh his memory. Courtnay v. Com., 5 Rand. (Va.) 666; Farmers' Bank v. Whitehall, 16 S. & R. (Penn.) 90; Cummings v. Fisher, Anth. (N. Y.) 1. Where an action was brought for goods sold, and the plaintiff offered proof that the entries in his books, charging the defendant with the goods, were made by his clerk, who had gone to the West Indies, held that such evidence was not competent to establish the claim. Kenedy v. Fairman, 1 Hayw. (N. C.) 458; Whitefield v. Walk, 2 id. 24. So, where the age of a defendant had been written in a Bible, held that this memorandum was not the best evidence, and the age might be proved by parol. ——— v. ———, 1 McCord (S. C.), 164; Butler v. Young, 3 Bibb (Ky.), 520; Berry v. Waring, 2 H. & G. (Md.) 103. See *post*, notes. And a memorandum by a district attorney, of the confession of a prisoner, need not be produced; but he may give oral evidence of such confession. Patton v. Freeman, Coxe (N. J. Eq.), 113. In South Carolina, the testimony of a witness who swears positively from written memoranda, though they do not call to his memory the facts, is held not only admissible, but better evidence than unaided recollection. Pearson v. Wightman, 1 Rep. Const. Ct. (S. C.) 344; Haig v. Newton, id. 423; Sharp v. Bingley, id. 373. See Brown v. Anderson, 1 Mon. (Ky.) 198; Guy v. Mead, 22 N. Y. 462. The general principle, however, deducible from a majority of the cases in this country is, that the witness may inspect notes or memoranda to refresh his memory, and then, if he can with a safe conscience swear to the facts independent of the memorandum, in other words, if he is then able to remember the facts, he may testify. He refreshes his memory from his memoranda, and then swears from recollection; but he will not be permitted to read his memoranda to the jury. Juniata Bank v. Brown, 5 S. & R. (Penn.) 87; Robertson v. Lynch, 18 John. (N. Y.) 451; Hawland v. Sheriff of Queens Co., 5 Sandf. (N. Y.) 219; Wood v. Ambler, 8 N. Y. 170.

[10] Meacham v. Pell, 51 Barb. (N. Y.) 65; Dinggs v. Smith, 4 J. & S. (N. Y. Sup. Ct.) 283. But if he has first sworn positively to the facts, he cannot refer to his books for the purpose of corroborating his testimony, as in that case his testimony and memory is wholly independent of the memoranda. Sackett v. Spencer, 29 Barb. (N. Y.) 180. But see Townsend Mfg. Co. v. Foster, 41 N. Y. 620, where it was held that, where a memorandum of what took place at a certain interview was made on the evening of the day when it transpired, and it corroborates the testimony given by the witness, it may be given for that purpose. So, in McCormick v. Penn., &c., R. R. Co., 49 N. Y. 303, it was held that, after proof of the facts contained in a memorandum, the paper itself may be read to the jury.

[11] Lewis v. Ingersoll, 1 Keyes (N. Y.), 347. And if the original memorandum is lost, he may refresh his memory, if the copy was made by himself or under his supervision, from a copy of it. Felkins v. Baker, 6 Lans. (N. Y.) 516.

reading it he is then able to recollect and testify to the facts contained therein.[12] A witness can refresh his recollection from a memorandum made by his bookkeeper from items on his books the data for which were furnished by the witness.[13] If the original memorandum is destroyed, a witness may refer to a copy thereof made by himself or under his direction and supervision.[14] Thus, in the case last cited, the plaintiff, who was a foreman and cutter in the defendant's shop, kept the account of his work upon slips of paper. These slips he took home with him every week, and every Saturday night he would figure up the number of hours he had worked, and his wife would set it down for him upon another paper, and the original slips were destroyed. He refreshed his memory from the copy made by his wife, and the court held that it was proper for him to do so, as under the circumstances the copy might be considered as the original memorandum made at the time by himself, or by his direction, which, in the language of MILLER, P. J., "is the same thing under the circumstances as if he had personally done it." In another New York case,[15] the plaintiff was tried and convicted of an assault with intent to kill. Upon the trial a police surgeon testified that when the complainant was brought to the station-house, he made a

[12] Smith v. Randall, 3 T. & C. (N. Y.) 798; Bogue v. Newcomb, 58 N. Y. 674; aff'd 1 T. & C. (N. Y.) 251. In Hotchkiss v. Mather, 48 N. Y. 478, it was held that the plaintiff, a witness upon the stand, might refresh his memory from a memorandum made by the defendant.

[13] Taft v. Little, 178 N. Y. 127, 591; 70 N. E. R. 211.

[14] Filkins v. Baker, 6 Lans. (N. Y.) 516; Green v. Disbrow, 7 id. 381. In State v. Collins, 15 S. C. 373, a witness in a capital case who was an employee in a hospital, was permitted to refresh his memory by referring to a contemporaneous record of the hospital, following Berry v. Jourdin, 11 Rich. (S. C.) 67, and distinguishing the case from Furman v. Peay, 2 Bailey (S. C.), 394; State v. Cardoza, 11 S. C. 239; and Bank v. Zorn, 14 id. 444. See also Cameron v. Blackman, 39 Mich. 108. In Cooper v. State, 59 Miss. 267, a witness who was an old man, whose memory was impaired, was permitted to refresh his memory from a paper written by him at the time. In State v. Miller, 53 Iowa, 154, it was held that a witness might refresh his memory by referring to the notes of his testimony taken before the grand jury. See Memphis, &c., R. R. Co., v. Maples, 63 Ala. 601, where it was held that before a witness can refresh his memory from books or papers it must be shown that he either wrote the entries or had knowledge of their accuracy even though his books, etc., were all the time in his custody. See also Acklin v. Hickman, 63 Ala. 494, where it was held that a witness may refresh his recollection from a memorandum when it was made by him, or known and recognized by him as stating the facts truly, when after such examination he can testify to the facts as a matter of independent recollection.

[15] Adams vs. The People, 3 Hun (N. Y.), 654.

statement to him as to the persons who had assaulted him; that the statement was written down upon a slate; that he thought names were mentioned in it, but could not remember what they were. A sergeant was then called, who testified that the slate was handed to him by the surgeon; that he copied it into the station-house blotter, and then rubbed out what was on the slate. It was held that the statement contained in the blotter was properly received in evidence, as the original memorandum had been erased from the slate and destroyed. In this case the rule is carried much further than the English cases have gone. In those cases the rule seems to be, that a witness may refresh his memory by a copy of a memorandum *when after looking at the copy he is able to swear positively to the facts stated therein from his own recollection, or that he knew the facts to be as stated therein at the time.*[15]

[15] Duchess of Kingston's Case, 20 How. St. Tr. 619; Tanner v. Taylor, cited in Doe v. Perkins, 3 T. R. 754. In Howard v. McDonough, 77 N. Y. 592, the court laid down the rule as to the use of memoranda as follows: "The law as to the use of memoranda by witnesses while testifying is quite well settled in this State. 1. A witness may, for the purpose of refreshing his memory, use any memoranda, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. 2. When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and which he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them. 3. Memoranda may be used in other cases which do not precisely come under either of the foregoing heads. A store of goods is wrongfully seized, and an action is brought to recover for the conversion. There are thousands of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case, a witness may make a list of all the items and their values, and he may aid his memory while testifying by such list. He must be able to state that all the articles named in the list were seized, and that they were of the values therein stated, and he may use the list to enable him to state the items. After the witness has testified, the memorandum which he has used may be put in evidence, not as proving anything of itself, but as a detailed seatement of the items testified to by the witness. The manner in which the memorandum, in such a case, may be used is very much in the discretion of the trial judge. He may require the witness to testify to each item separately, and have his evidence recorded in the minutes of the trial, and then the introduction of the memorandum will not be important; or he may allow the witness to testify quite generally to the items and their values, and receive the memorandum as the detailed result of his examination, leaving to the adverse party a more minute cross-examination. Without the use of a memorandum in such cases, it would be difficult, if not impossible, to conduct a trial in-

In any event, it is questionable whether the copy should be used, so long as the original is in existence, and its absence unex-

volving the examination of a large number of items. Driggs v. Smith, 36 N. Y. Superior Court, 283; McCormick v. Penn. Cent. R. R. Co., 49 N. Y. 303; Acklin v. Hickman, 63 Ala. 594; 35 Am. Rep. 54. In Com. v. Ford, 130 Mass. 64, it was held that a newspaper reporter, called as a witness, may refresh his memory as to an occurrence in his presence by referring to a printed report of it written by him at the time. "We are of opinion," said ENDICOTT, J., "that the witness should have been allowed, for the purpose eof refreshing his memory, to look at the printed report, which he stated, as of his own knowledge, was printed substantially as made by him. It was not contended that the written or printed report or any portion of its contents could be put in evidence. It was clearly incompetent, in any aspect of the case, as presented. The rule, therefore, that to prove by oral testimony the contents of a paper, relied on as evidence, it is necessary first to show that it has been lost or destroyed, or that upon diligent search it cannot be found, has no application to this case. If such rule did apply, it is difficult to see why it was not competent for the defendant to prove that it was the custom in the Herald office to destroy all such original written reports after printing them; but that question it is not necessary to consider."

In order to refresh the recollection of a witness, *it is not important that the paper, book, or memorandum should have been written or printed by the witness himself, or that it should be an original writing. It is sufficient if he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed.* Upon inspecting it, he can state the facts if thereby called to his recollection. Chapin v. Lapham, 20 Pick. (Mass.) 467.

In Coffin v. Vincent, 12 Cush. (Mass.) 98, which was trespass for taking and carrying away certain sheep, the defendants attempted to prove that the sheep were taken by them as field-drivers, while running at large, and for that cause were taken up and impounded. To prove this, they called a witness to show the contents of the notice posted up by them as field-drivers, which notice had been lost or destroyed; and in testifying to its contents it was held that the witness could refresh his recollection by referring to a form of such notice, which, though not made by himself, he had compared with the notice posted up, and found them to correspond. In that case, the general rule applicable here is well stated, though the case differs from this in the fact that the contents of an original paper were sought to be proved, and therefore it was necessary to show that it had been lost. In this case, the original written report of the witness could not have been used in evidence. In Kensington v. Inglis, 8 East, 273, a license to trade with the enemy had been lost. A witness was called, who had made an entry of it in his memorandum book for the private information of himself and his employer, which book was not produced in evidence; and it was held that the witness might testify to the contents of the license from memory, although the book was not produced, for if in court, it would not have been evidence *per se*, but could have been used by the witness only to refresh his memory.

The case most nearly resembling the case at bar is Horne v. Mackenzie, 6 Cl. & Fin. 628. A surveyor made a survey and report, which he furnished to his employers, and being called as a witness he produced a printed copy of this report, on the margin of which he had two days before, to assist him in giving his explanation as a witness, made a few jottings. The printed report had been made up from his own original notes, of which it was in substance, though not in words, a transcript, and it was held that he might look

plained; *for the rule requiring the production of the best evidence is equally applicable, whether a paper is produced as evidence in itself, or is merely used to refresh the memory.*[17] If the copy is an imperfect extract, or is not proved to be a correct copy, or if the witness has no *independent* recollection of the facts narrated therein, the original must be used.[18]

at the printed copy to refresh his memory. In Rex v. Duchess of Kingston, 20 How. St. Tr. 355, 619, a witness was allowed to use a copy of his own memorandum made by another person in his presence. In Burton v. Plummer, 2 Ad. & El. 341, a clerk of a tradesman entered the transactions in trade, as they occurred from his own knowledge, and the tradesman copied them into a ledger in the presence of the clerk, who checked them as they were copied. It was held that the clerk might use the entries in the ledger to refresh his memory, though the waste-book was not produced nor its absence accounted for, the entries in the ledger having been made as by the clerk himself. It was in the nature of the duplicate original, and is similar to the case at bar, where the written report of the witness was printed in the newspaper, to his own knowledge substantially as made by him. See, also, Burrough v. Martin, 2 Camp. 112; Wood v. Cooper, 1 Car. & K. 645; Doe v. Perkins, 3 T. R. 749; Regina v. Langton, 2 Q. B. D. 296.

In Huff v. Bennett, 6 N. Y. 337, it was said: "It is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, provided after inspecting it he can speak to the facts from his own recollection." So a witness may be allowed to refresh his memory from notes taken by counsel at a former trial; Regina v. Philpotts, 5 Cox C. C. 329; or from his dispostion, or a copy of the same. Smith v. Morgan, 2 Mood. & Rob. 257; George v. Joy, 19 N. H. 544. And in Henry v. Lee, 2 Chit. 124, where a witness was allowed to refresh his memory from a document not written by him, Lord ELLENBOROUGH said: "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum was written by himself; for it is not the memorandum that is the evidence, *but the recollection of the witness.*" Com. v. Jeffs, Mass. S. C. 1882; Queen v. Langton, 2 Q. B. Div. 296; State v. Collins, 15 S. C. 373; State v. Rawls, 2 N. & McCord (S. C.), 331; Berry v. Jordon, 11 Rich. (S. C.) 67. But see State v. Cardoza, 11 S. C. 239; Bank v. Zorn, 14 id. 444. In South Carolina it seems that the memoranda must be contemporaneous with the happening of the event. State v. Collins, *ante;* Ballard v. Ballard, 5 Rich. (S. C.) 495.

[17] Burton v. Plummer, 2 Ad. & El. 344. See, also, Jones v. Stroud, 2 C. & P. 196.

[18] Doe v. Perkins, 3 T. R. 749, explained by PATTESON, J., in 2 Ad. & El. 215; R. v. Hedges, 28 How. St. Tr. 1367, *per* Lord ELLENBOROUGH; Solomons v. Campbell, cited 1 St. Ev. 177, 178, n., *per* ABBOTT, C. J. Original entries and memoranda with a suppletory oath, may be read in evidence, though not made in the course of business, and though the witness has no recollection as to the facts they recite. Thus, the question being whether an indorsement of payment on a note was made in time to take the case out of the Statute of Limitations, a written computation made at a subsequent date, with the purpose of determining the amount then due, and in which no such payment was included, was held admissible with the oath of the party making it. Guy v. Mead, 22 N. Y. 462. The question being as to the length of credit given, the defendant, on notice from the plaintiff, produced the origi-

In an English case,[19] the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a ledger. The transactions in trade had been noted by the clerk in a waste-book as they occurred, and the plaintiff, day by day, had copied the entries into the ledger, each entry being at the time checked by the clerk. Under these circumstances the court regarded the ledger as an original, and allowed the witness to refresh his memory thereby without accounting for the absence of the waste-book. And in another case,[20] where a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers, and compiled from his original notes, of which it was substantially, though not verbally, a transcript, the report seems to have been treated in the light of an original document; and although it contained some marginal notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations, which the witness, if time were given him, could repeat without their aid.

nal, the bill of sale, on which was minuted the time of credit. This evidence was held not to be overcome by the testimony of the plaintiff's book-keeper, which tended to show that he had made such memoranda without instructions from the plaintiff so to do. Leeds v. Dunn, 10 N. Y. 469. The plaintiff having testified that a certain agreement was made in the presence of H., and that H. at the time made a written statement of the mode of settlement of the parties' accounts, upon the basis of which such agreement was made, it was held that it was competent for the plaintiff to introduce in evidence, as corroborative of his own testimony, such written statement. Norton v. Downer, 33 Vt. 26. A memorandum, though not signed by the party, is admissible in connection with his admissions that it contained the contract. Hosford v. Foote, 3 Vt. 391. If a question of time is material, a writing which the plaintiff testifies that he drew up in connection with a settlement with the defendant, and showed to the latter, who made no objection to it, is admissible in evidence to fix the time in dispute, although it is not found that the paper was in fact shown to the defendant, or that the date upon it, which tends to fix the time, is correct. Goodnow v. Parsons, 36 Vt. 46. A memorandum of an oral agreement, written and signed by the plaintiff upon his private memorandum book, for his own private reference, is not conclusive upon any one, but is at most a piece of evidence not admissible in favor of the plaintiff, except when accompanied by proper parol proof, and not competent against him except as an admission, the force of which is to be determined by proof of the circumstances under which it was made. Stannard v. Smith, 40 Vt. 513.

[19] Barton v. Plummer, 2 Ad. & El. 344.

[20] Horne v. McKenzie, 6 Cl. & Fin. 628, 630, 645. See, also, Topham v. Macgregor, 1 C. & Kir. 320, where the writer of an article in a newspaper was allowed to refresh his memory by the paper, his MS. being proved to be lost.

Sec. 117. Memorandum should be made by Witness.

As a general rule, before a witness can refresh his memory by looking at memoranda, it seems to be further necessary that they should have been made either *by the witness* himself, or *by some person in his presence,*[1] or that he should have examined them while the facts were fresh in his memory, and should then have known that the particulars therein mentioned were correctly stated.[2] In accordance with the last part of this rule, a witness has been allowed to refer to a log-book, which, though not written by himself, had, from time to time, and while the occurrences were recent, been examined by him.[3] So, where it has been material to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions, taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them.[4] So, if the witness has checked an entry made by another person;[5] or has actually seen money paid and a receipt given;[6] or has read a memorandum to a party who has assented to its terms;[7] in all these, and similar cases he will be allowed to look at the document itself, for the purpose of refreshing his memory as to the facts men-

[1] Duchess of Kingston's Case, 20 How. St. Tr. 619.

[2] Curtis v. Bradley, 65 Conn. 99, 31 A. 591, 48 Am. St. Rep. 177 and note p. 190; Hart v. Godkin (Wis. 1904), 100 N. W. 1057; State v. New Orleans Waterworks Co., 107 La. 1, 31 So. 395, 411; Meyers v. McAllister (Minn., 1905), 103 N. W. 564.

[3] Burroughs v. Martin, 2 Camp. 112. In Gilchrist v. Brooklyn, &c., Association, 39 N. Y. 495, it was held that, in order to render a memorandum admissible, the witness should identify the handwriting as his own. Thus, in that case, in an action to recover the purchase price of a quantity of potatoes, alleged to have been purchased by the plaintiff as agent for the defendant, and shipped to the latter by canal, the defendant claimed a deficiency in quantity as shown by the weight of the boat and cargo, at a weigh-lock upon the canal. The defendant called a witness, who testified that, in his belief, the entry in the weigh-book was in his handwriting, and, if so, he weighed the boat, and it was weighed correctly; he then stated the weight from the entry. On cross-examination it appeared that the witness had no connection with the weighing lock, but occasionally weighed boats; that he could not swear that the entry was in his handwriting, and that he had no recollection of the matter independent of the entry. Lines were drawn over the entry in the book, and an entry appeared under date two days later, in another hand, of the weight of the boat. The plaintiff moved to strike out the evidence as to weight, which was refused, which the court held to be error.

[4] Smith v. Morgan, 2 M. & Rob. 257; Wood v. Cooper, 1 C. & Kir. 645; Vaughan v. Martin, 1 Esp. 440.

[5] Burton v. Plummer, 2 Ad. & El. 341.

[6] Rambert v. Cohen, 4 Esp. 213.

[7] Bolton v. Tomlin, 5 Ad. & El. 856; Jacob v. Lindsay, 1 East, 459; R. v. St. Martin's, Leicester, 2 Ad. & El. 210.

tioned therein. In some cases a greater latitude has prevailed, and witnesses have been allowed to refresh their memories from the brief notes of counsel taken at a former trial, provided they could afterwards speak from recollection, and not merely from the notes.[8]

Sec. 118. Memorandum may be used, although its Contents would not be Admissible.

As a writing, used to refresh the memory, does not thereby become evidence of itself, it is *not necessary* that it should even be *admissible;* and therefore, a receipt which cannot be read for want of a stamp, may yet be referred to by the witness in giving his evidence.[1] Neither is it essential, when notes are used by a witness who is called to prove a conversation, a speech, or the like, that they should contain a *verbatim* account of all that was uttered. Thus, where it appeared that a short-hand writer had taken a *verbatim* note of such parts of an address as he deemed material, and was merely able to swear to the *substantial correctness of the remainder,* he was permitted to read the whole, although it was strongly urged that, as by the witness's own showing the note was a *partial* one, the fullness, and consequent accuracy, of which rested on his private opinion of the materiality of what was spoken, he was not entitled to use it at all, but was bound to depend on his memory alone.[2] If the witness has become *blind,* or from other cause is unable to read the entries, the paper may be read over to him, in order to excite his recollection.[3]

Sec. 119. Witness need not have Recollection, Independent of the Memorandum.

If a witness has no present recollection of a matter as to which he is called to give evidence, either independently of or with reference to a memorandum made by him, or by another and found by him on a verification thereof to be correct, but is possessed of a memorandum which he testifies he made and then

[8] Lawes v. Reed, 2 Lew. C. C. 152, citing Balme v. Hutton as a similar case. See, also, Henry v. Lee, 2 Chitt. 124.

[1] Maugham v. Hubbard, 8 B. & C. 14; Jacob v. Lindsay, 1 East, 459; Ramber v. Cohen, 4 Esp. 213, *per* Lord ELLENBOROUGH; Catt v. Howard, 3 Stark. 3, *per* ABBOTT, C. J.

[2] R. v. O'Connell, Armstr. & Trev. 165-167.

[3] Catt v. Howard, 3 Stark. 3, *per* ABBOTT, C. J.; Vaughan v. Martin, 1 Esp. 440, *per* Lord KENYON.

knew that it was according to the facts, or was made by another and subsequently by him verified and found to be correct, when he had knowledge of the facts, so that he is able by a present reference to the paper to testify to the truth of the matter by relation to his former knowledge, he may properly so testify, and the paper itself may properly be received in evidence, not as an independent evidentiary instrument, but as part of the witness' testimony.[1] The transcript of testimony given in evidence by a witness in a previous case may be put in evidence although the witness is present and through lapse of time has no recollection of the matters contained in his previous testimony, if the witness can say that if the testimony contained in the transcript was that given by him in the previous case it was true. Such transcript need not be used actually to refresh the recollection of the witness but may itself be admitted and read in evidence.[2] A list of personal property may be received in evidence on testimony of a witness that he knew it was correct when made even although the witness did not testify that he was unable to recollect the separate items apart from the list as the list upon its face satisfactorily showed that he could not truthfully so testify it being a list of some 600 different items of personal property.[3] Thus one who has taken notes of testimony may read his notes in evidence when he swears that he knew they were correct when taken even although he has no independent recollection of the testimony.[4] Thus, where a clerk entered notes in a bill-book at the time when they were delivered and in the due course of business, and upon being called as a witness he was unable to testify, in-

[1] Hart v. Godkin (Wis., 1904), 100 N. W. 157. Memoranda made by a witness which he knew were correct when made but of which he has no independent recollection are admissible as pieces of evidence in themselves in Connecticut. This rule was applied to certain slips filed on a spindle containing the pay roll of men working on a house. Curtis v. Bradley, 65 Conn. 99, 31 A. 591, 48 Am. St. Rep. 177, and note, p. 190; Guy v. Mead, 22 N. Y. 462; Marclay v. Shulz, 29 id. 346; Meacham v. Pell, 51 id. 65; Wilde v. Hexter, 50 Barb. (N. Y.) 448; Heath v. West, 26 N. H. 191. If a witness, upon looking at a memorandum made by him at the time, is able from it to testify to the delivery of goods, the testimony is admissible, although he has no present recollection of the transaction except that afforded by the memorandum, which is not itself competent evidence. Dugan v. Mahoney, 11 Allen (Mass.), 572.

[2] State v. New Orleans Waterworks Co., 107 La. 1, 31 So. 395, 411.

[3] Meyers v. McAllister (Minn., 1905), 103 N. W. 564.

[4] O'Brien v. Stambach, 101 Iowa, 40, 69 N. W. 1133, 63 Am. St. Rep. 368; State v. Smith, 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428.

dependently of the entry, what the contents of the notes were, it was held that the entries were admissible.[5] So, where an agent, who had made a parol lease, and entered a memorandum of the terms in a book, stated that he had no memory of the transaction but from the book, though on reading the entry he entertained no doubt that the fact really happened, it was held sufficient;[6] and a barrister, called to prove that a witness had materially varied his account since the last trial, has been allowed to refresh his memory by the notes on his brief, though he had no independent recollection of what took place on the former occasion.[7] So, where a banker's clerk is shown a bill of exchange, which has his own writing upon it, from which he knows and is able to swear positively that it passed through his hands; or a witness, from seeing his own signature to the attestation of a deed,[8] or to any species of document,[9]

[5] Kennedy v. Crandall, 3 Lans. (N. Y.) 1, MILLER, P. J., saying: "These entries were made at the time when the note was given, and tend strongly to corroborate the testimony of White, who relied upon the entries, and who would not swear positively that the words were not in the notes, independent of them. They were not in the nature of naked hearsay evidence or statements in writing of third parties, but entries of transactions made at the time by the clerk of the party in the regular course of business. In Marclay v. Shulz, 29 N. Y. 346, it was held to be competent to read an entry made by a witness of any fact material to the issues, if made at or near the time when the fact occurred, and he can swear it was made correctly. See, also, Guy v. Mead, 22 N. Y. 462; Halsey v. Sinsebaugh, 15 N. Y. 485, within the rule laid down in the authorities last cited. The bill-book introduced contained an original memorandum made by the witness when the facts stated transpired, and was clearly admissible evidence." See, also, Hildreth v. Lowell, 11 Gray (Mass.), 345; Briggs v. Rafferty, 14 id. 525; Perkins v. Augusta, &c., Co., 10 id. 312. Where the maker and the holder of a note had mutually compared memoranda of the payments made on the note, in an action in favor of the estate of the deceased holder, such memorandum is admissible to prove payment. Meyer v. Reichardt, 112 Mass. 108.

[6] Haven v. Wendell, 11 N. H. 112; R. v. St. Martin's, Leicester, 2 Ad. & El. 210. See, also, Haig v. Newton, 1 Const. R. (S. C.) 423; Sharpe v. Bingley, id. 343; Maugham v. Hubbard, 8 B. & C. 14. In Bank of Tennessee v. Caman, 7 Humph. (Tenn.) 70, a notary's book contained an entry of protest for non-payment, and of notice given, and the notary stated that he was in the habit of making such entries at the happening of the event. It was held that *his belief, based upon such entry,* was good evidence, and that he need not swear that he had a recollection of the protest and notice.

[7] R. v. Guinea, Ir. Cir. R. 167, *per* CROMPTON, J.

[8] In Briggs v. Rafferty, 14 Gray (Mass.), 525, the freight books of a railroad company, supported by the testimony of the clerk who made the entries therein, that he had no doubt that the facts stated therein were correct, are admissible, although he swears that he has no personal recollection of the facts. See, also, Perkins v. Augusta Ins., &c., Co., 10 Gray (Mass.), 312; Parsons v. Manufacturers' Ins. Co., 16 id. 463.

[9] Maugham v. Hubbard, 8 B. & C. 16, *per* BAYLEY, J.; R. v. St. Mar-

says that he is therefore sure that he saw the party execute it, this is sufficient proof of the execution, though he adds that he has no recollection of the fact.[10] In a Massachusetts case,[11] in an action against an officer for not returning an execution, the docket of the attorney who took out the execution containing an entry that it was delivered to the officer on a certain day, taken in connection with the testimony of the attorney that he should not have made the entry unless he had delivered the execution or known of its delivery, was held sufficient evidence that the execution was so delivered, although he had no recollection of making the entry or delivering the execution; and the same rule was adopted where a constable made a return of the service by him of a notice issued by a city council, under an ordinance of the city, but where he swore that he had no recollection of the fact of service except from the circumstances that the return was written and signed by him;[12] and also as to entries made in the books of a bank by a cashier, treasurer or clerk, when the entries are identified by them, although they have no personal recollection of the facts.[13] So the freight books of a railroad company, supported by the testimony of the person making the particular entries therein that he has no doubt that the facts stated therein are correct, although he has no other knowledge thereof than the circumstance that the entry was made.[14]

And it seems that such entries are admissible, although the clerk or person called to verify them made only part of them, and has no personal recollection of the facts beyond that afforded by the entries, especially when the witness can swear that from the course of business he believes the entries state the facts.[15]

tin's, Leicester, 2 Ad. & El. 213, *per* TAUNTON, J.; Russell v. Coffin, 8 Pick. (Mass.) 143; Jackson v. Christman, 4 Wend. (N. Y.) 277; Pigott v. Holloway, 1 Binn. (Penn.) 436; Smith v. Lane, 12 S. & R. 84; Clark v. Vorce, 15 Wend. (N. Y.) 193.

[10] R. v. Hardy, 24 How. St. Tr. 824, *per* EYRE, C. J.

[11] Bunker v. Shed, 8 Met. (Mass.) 150.

[12] Hildreth v. Lowell, 11 Gray (Mass.), 345.

[13] Anderson v. Edwards, 123 Mass. 273; Jordan v. Osgood. 109 id. 457.

[14] Briggs v. Rafferty, 14 Gray (Mass.), 525; Adams v. Caulliard, 102 Mass. 167.

[15] Bradford v. Stevens, 10 Gray (Mass.), 379.

Sec. 120. When the Opposite Party is Entitled to see the Memorandum.

In all cases where documents are used at the trial for the purpose of refreshing the memory of a witness, it is usual and reasonable, and if the witness has no independent recollection of the fact, it is necessary, that the *opposite counsel* should have an *opportunity of inspecting* them, in order that on cross, or re-examination, he may have the benefit of the witness's refreshing his memory by every part.[1] Neither is the adverse party bound to put in the document as a part of the evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to;[2] but if he goes further than this, and asks questions as to other parts of the memorandum, it seems that he thereby makes it his own evidence.[3] If a paper is put into the hands of a witness merely to prove handwriting, and not to refresh his memory,[4] or if put into his hands for the purpose of refreshing his memory, but the question founded upon it utterly fail, the opposite party is not entitled to see it.[5]

Sec. 121. Memorandum itself only Admissible, when.

The rule is, that a memorandum itself only becomes evidence when the witness, after examining it, although able to swear that he knew it to be correct when he made it, is unable to state the particulars from recollection,[6] and when it is admitted it is subject to explanation, by the party making it, to the same extent that it would have been if the words had been spoken instead of written.[7]

[1] Howard v. Canfield, 5 Dowl. 417, *per* COLERIDGE, J.; R. v. St. Martin's, Leicester, 2 Ad. & El. 215, *per* PATTERSON, J.; Sinclair v. Stevenson, 1 C. & P. 583, *per* BEST, C. J.; Lloyd v. Freshfield, 2 C. & P. 332; Dupuy v. Truman, 2 You. & Coll. Ch. 341.

[2] R. v. Ramsden, 2 C. & P. 604, *per* Lord TENTERDEN; Gregory v. Tavernor, 6 C. & P. 281, *per* GURNEY, B.

[3] Gregory v. Tavernor, 6 C. & P. 281. See Stephens v. Foster, 6 C. & P. 289.

[4] Russell v. Rider, 6 C. & P. 416.

[5] R. v. Dunscombe, 8 C. & P. 369.

[6] Curtis v. Bradley, 65 Conn. 99, 31 A. 591. 48 Am. St. Rep. 177, and note, p. 190; Hart v. Godkin (Wis., 1904), 100 N. W. 1057; State v. New Orleans Waterworks Co., 107 La. 1, 31 So. 395, 411; Meyers v. McAllister (Minn., 1905), 103 N. W. 564; Kelsea v. Fletcher, 48 N. H. 282. In Paine v. Sherwood, 19 Minn. 315, a memorandum containing several items of account was handed to the witness, who testified that he was able to state some of the items without looking at the memorandum, which was not original, nor the absence of the original accounted for. It was held that under these circumstances the memorandum was improperly permitted to be read in evidence.

[7] Rice v. Heath, 39 Cal. 609.

Sec. 122. Memoranda in which Party can have no Interest to Falsify.

There is a class of memoranda which, although not against interest, or made in the course of any business, are nevertheless admissible *from the very circumstance that the maker could have no interest to falsify the facts.* Thus it has been held that a record of the weather kept for a number of years at a State insane asylum is competent evidence to prove the temperature of the weather on a given day included in the record.[8] So entries made regularly by a person in his diary may be admissible but only when properly authenticated. Thus on the issue as to the location of a deceased grantor of a deed on a certain day his diary showing what he did on that day is inadmissible without identification and without proof that it was written at the place and on the day that it purported to be written.[9]

Sec. 123. Minutes of Testimony of Deceased Witnesses.

The minutes of testimony taken by an attorney of a witness, since deceased, are not admissible as evidence *per se,* but the attorney may testify as to the evidence given by the deceased witness, and will be permitted to use his notes as memoranda to refresh his memory;[1] and the same is true as to the minutes of the presiding judge. He may testify as to what the witness said, using his minutes to refresh his memory, but his notes of the evidence are not *per se* evidence,[2] even though he is also dead.[3] But in many of the States it is held that when testimony is taken down upon the trial, and the person taking it down swears that it contains the evidence of the deceased, it may be read in evidence;[4] and in all cases, in those States where a stenographer is appointed by the court under a statute authorizing him to do so, the minutes of testimony taken by him would be admissible, if their genuineness is established.

[8] Armond v. Neasmith, 32 Mich. 231. See, also, *post,* § 212, as to official weather reports.

[9] Elliott v. Sheppard, 179 Mo. 382, 78 S. W. 627.

[1] Waters v. Waters, 35 Md. 357.

[2] Miles v. O'Hara, 4 Binn. (Penn.) 108; Daton v. Wallis, 1 N. & McCord (S. C.), 409. See "Testimony of Deceased Witness."

[3] Foster v. Shaw, 7 S. & R. (Penn.) 156.

[4] Moore v. Parsons, 9 M. & S. (Penn.) 51; Riggins v. Brown, 12 Ga. 271; Ashe v. De Rosetts, 5 Jones (N. C.) L. 299; Van Buren v. Cockburn, 14 Barb. (N. Y.) 118; Mineral Point R. R. Co. v. Keep, 22 Ill. 9.

CHAPTER XII.

Books of Corporation.

Section 124. Entries in bank books, when admissible.
125. Books of corporations generally, rules as to admission of.

Sec. 124. Entries in Bank Books, when Admissible.

Entries in the books of a deceased notary of the protest of a note by him are admissible to establish the fact of protest,[1] and such also seems to be the rule as to an entry made by a notary's clerk.[2] So, too, it has been held that memoranda made by a bank messenger of demands on promisors and notices to indorsers, in respect to notes left for collection in the bank, are, after his decease, admissible to establish such demands and notices, upon the ground *that they were made in the due course of business.*[3] In order to

[1] Nichols v. Webb, 8 Wheat. (U. S.) 326.

[2] Sutton v. Gregory, Peaks, 150. In Poole v. Dieas, 7 C. & P. 79, in an action against an indorser upon a bill of exchange after proof of the acceptance and indorsement, in order to prove presentment, a witness was called, who stated that he was, at the time when the bill became due, clerk to Mr. Harrison, a notary, and that it was brought there, and, according to the course of business, copied into a book; and that, in the margin of that book, besides the copy of the bill, was an entry in the handwriting of a person named Manning, who was then also a clerk of Mr. Harrison's, but who had since died. It was in the following words: "Out of town, and no orders.—C. J. M." The witness stated that the entry was in accordance with the course of business in the office, and purported to be the answer received by Manning on the presentment of the bill; and he added that such entries were almost always made on the same evening, immediately on the clerk's return, and never later than the following morning; and that the presentment of bills, according to the practice in London, was made after seven in the evening. On inspection of the bill a ticket appeared upon it, containing a similar entry to that in the margin of the book, but made, according to the testimony of the notary's clerk, by another clerk named Hawes, from the statement of Manning, which other clerk he believed was still living, and in business in the city. The bill was presented on Saturday, and a clerk of the plaintiff proved that he put a letter to the defendant, giving notice of its dishonor, into the New Post-office, on the Monday. Garlee, J., left the evidence to the jury, and upon a rule for a new trial, his ruling was sustained. See, also, Nichols v. Webb, 8 Wheat (U. S.) 326; Nichols v. Goldsmith, 7 Wend. (N. Y.) 160; Halliday v. Martinett, 20 John. (N. Y.) 168.

[3] Welsh v. Barrett, 15 Mass. 381. Where a bank messenger, in an action against an indorser, testified

prove a debt due from a bank to a certain party the ledgers or balance books of the bank are admissible in evidence when made in the due course of business by those authorized to make them and are admissible not only against the corporation but against its stockholders in an action to enforce their statutory liability. These are not secondary evidence simply because pass books were issued to each of the depositors in which the amount of their deposits was entered by the receiving teller at the time they were made and the balance books are admissible without the production of the pass books.[4] But it seems that an entry made in a bank book which goes to prove that the bank in that instance departed from a well-established usage, is not admissible in favor of the bank, even though the person making it is dead. Thus, it has been held that a book of original entries made by a deceased teller of a bank is not admissible to prove payments made to a depositor, where the custom was to pay money to depositors on checks.[5] But where the entry is of money paid on a check, and the check has been returned to the depositor, the rule would be otherwise, especially if the depositor, upon notice to do so, refused to produce the check. But entries made by third persons upon the books without the knowledge of the parties to the litigation are not proper evidence, because such books are not public records, and do not fall within any recognized class of written or documentary evidence.[6] But where the entries are made by a person having authority to make them, *in the due course of business,* and he is dead, they are evidence, in actions in favor of or against the bank, to prove either the deposit, loan or payment of money either to or by the bank.

that he never had seen the note in suit, but that he gave the defendant notice of its non-payment, from a minute in a book kept at the bank, containing a minute description of notes becoming due there, the evidence was held to have been properly left to the jury. Weld v. Gorham, 10 Mass. 366; Shove v. Wiley, 18 Pick. (Mass.) 558; Washington Bank v. Prescott, 20 id. 339. In Bank of the United States v. Davis, 4 Cranch (U. S. C. C.), 533, a memorandum made by a deceased note clerk of the bank, that he had delivered a certain notice, was held admissible.

[4] Zang v. Wyant, 25 Col. 551, 56 P. 565, 71 Am. St. Rep. 145.

[5] Bank of Montgomery v. Plannett, 35 Ala. St. Cas. 178. But see Union Bank v. Knapp, 3 Pick. (Mass.) 96, where it was held that in an action by a bank against a depositor for having overdrawn his account, the books of the bank are proper evidence to show receipts and payments of money, as the officers of the bank, to that extent, are to be deemed the agents of both parties; and if the clerk or person making the entry is dead, it is sufficient, to let in the books, that the entries are shown to be in his handwriting.

[6] Barnes v. Simmons, 27 Ill. 512.

In a New York case,[7] the fact that a bank clerk surrendered a note upon erroneously receiving, as full payment, less than the amount due thereon, was established against the positive testimony of the maker thereof that the full amount was paid, by proof that the figures in the margin of the note had resembled such less sum ($210), more than the sum named in the body ($510), and had been torn off after the surrender and before the production of the note in court, and that the less amount was named in the bank notice and books, and that the bank balance sheet of the day of maturity showed an error in the day's transactions of only seven cents (instead of $300).[8] So, too, such books are evidence between the bank and its stockholders,[9] but not in actions between strangers,[10] unless it is shown that the clerk who made the entry is dead or beyond the reach of process; nor is such book admissible to explain an entry in the private bank book of the opposite party, if the latter be produced only on notice given by the party offering the bank book,[11] or unless the entries upon the books of the bank can be verified by living witnesses who made them or furnished the data

[7] Metropolitan Bank v. Smith, 4 Robt. (N. Y.) 229. In Ocean Nat. Bank v. Carll, 9 Hun (N. Y.), 239, the plaintiff, in order to prove that it was the *bona fide* holder of the note in suit, produced a discount register of the bank used at the time of the discounting of the note, which contained entries which tended to show that the note was discounted by the bank on the 31st of July, 1869, and proved that at that time one H. S. Murray was discount clerk of the bank, and that he was dead; that it was his business to make the entries, and that they were made in the usual course of business and were in his handwriting. The court held that the entries were admissible. "The rule is," said Bronson, J., in Brewster v. Doane, 2 Hill (N. Y.), 537, "that entries and memoranda made in the usual course of business by notaries' clerks and other persons may be received in evidence after the death of the person making them." Halliday v. Martinet, 20 John. (N. Y.) 168; Butler v. Wright, 2 Wend. (N. Y.) 369; Hart v. Wilson, 2 id. 513; Nichols v. Goldsmith, 7 id. 160. And in Sheldon v. Benham, 4 Hill (N. Y.), 129, where the entries made by the teller of the bank were offered in evidence, Bronson, J., said: "It is enough that he acted on this occasion in the usual course of his employment, and being dead, the entries which he made at the time were properly received in evidence. The rule for admitting them is not confined to entries made by public officers." Welsh v. Barrett, 15 Mass. 380. Where there is any reason for doubt, it is for the jury to say how much they prove. Davis, P. J., in Ocean Nat. Bank v. Carll, *ante*.

[8] In Snow v. Thomaston Bank, 19 Me. 269, entries made by the cashier, of the appropriation of money which the bank was to apply to the payment of notes belonging to it, are admissible to prove such appropriation, especially where it is shown that the party interested had seen the entries and did not object to them.

[9] Merchants' Bank v. Rawle, 21 Ga. 334.

[10] Union Bank of Florida v. Call, 5 Fla. 409.

[11] Philadelphia Bank v. Offiver, 12 S. & R. (Penn.) 49.

upon which they were made. Thus, in an action between two persons who have been in the habit of dealing with each other by notes and checks on a bank, the books of the bank are competent evidence to show what disposition has been made of such notes and checks, and how the proceeds have been applied and used.[12] So the books of a bank, in which the parties to action have kept their accounts, are competent to prove that a check, given by the plaintiff to the defendant, had been carried to the credit of the latter in the books of the bank, and that the money had thus come into possession of the latter. And where it was in evidence that the defendant promised to send his daughter to the school of the plaintiff and that she did attend the said school, it was held that the plaintiff's books of account were competent evidence to prove the amount of service so rendered, and also the amount of books and stationery furnished to her for the purpose of instruction.[13]

In an action against a bank by a depositor, to recover on a special deposit, the books of the bank are admissible to show the character of the deposit. Thus in an action to recover from a bank a certain sum in gold, which the plaintiff claimed to have deposited in the defendant's bank, specially, an entry in the bank book of the plaintiff as follows: "1861, Dec. 30th, cash (coin) $3,000," was held admissible for the purpose of verifying the testimony of a witness, and of showing the nature of the particular entry, and it was also held that the plaintiff was not bound to put in evidence all the other entries in the books.

Pass books, in which the bank enters the deposits made by, as well as its payments to, a depositor, are evidence in an action between the bank and the depositor,[14] and it has been held that where entries of deposits are made by a clerk of the bank in the pass book when the deposit was made, and of which he had knowledge, they are conclusive on the bank, but if the deposit is made, and the entry is afterwards copied upon the pass book from the ledger, the bank is not concluded thereby, because the entry then stands as mere hearsay,[15] and is entitled to no more force than any ordinary copy. The books of a bank, like those of a merchant or shop-keeper, must be proved by the suppletory oath of some officer

[12] Oliver v. Phelps, 20 N. J. L. 180.
[13] Oliver v. Phelps, 21 N. J. L. 597.
[14] McKanelin v. Bresslin, 8 Gray (Mass.), 177; Jermain v. Denniston, 10 N. Y. 276.
[15] Manhattan County v. Lydig, 4 John. (N. Y.) 377.

or agent of the bank, and are open to impeachment, not as a whole, but as to separate or particular items, and the degree of weight to be given them will depend upon the general accuracy with which they are shown to have been kept.[16] Entries in the books of a bank by a person since deceased, made in the usual course of business, and by one whose duty it was to make them, and who had no interest to misrepresent the facts, are admissible in evidence.[17]

Bank books, proved to have been regularly kept, and open to the inspection of the president of the bank, and probably examined by him are admissible in evidence in an action against him by the receiver of the bank to recover of him on an account due the bank as it stood on their books; as also are the returns made by the bank to the bank commissioners during his presidency, which could not have been made up without including, with the amount of indebtedness from directors to the bank, the account against the president, and which were examined and allowed by him. The minute book of a bank directors' meeting, regularly kept by the cashier, and recognized by the president as authority, is good evidence of who were present and what was done by the board at a particular meeting, as between one who was president and director of the bank at the time the minute was made, and a receiver of the bank who represents the corporation.[18]

Sec. 125. Books of Corporations generally, Rules as to Admission of.

Where the books of a corporation, containing a record of its votes and acts, are kept by the proper officer, they are evidence of its acts and proceedings,[1] especially as between it and its stock-

[16] Merchants' Bank v. Rawle, 7 Ga. 191.

[17] Wheeler v. Walker, 45 N. H. 355. That the books of a bank are evidence of the receipts and payments stated, see Union Bank v. Knapp, 3 Pick. (Mass.) 96.

[18] Olney v. Chadsey, 7 R. I. 224; Alabama, &c., R. R. Co. v. Nabors, 37 Ala. 489.

[1] Ewings v. Speed, 5 Wheat. (U. S.) 420; Barrington v. Pittsburgh, &c., R. R. Co., 34 Penn. St. 358; McHorn v. Wheeler, 45 id. 32; Jefferson v. Stewart. 4 Harr. (Del.) 82; Highland Turnpike, &c., Co. v. McKean, 10 John. (N. Y.) 154; Hamilton, &c., Plank Road Co. v. Rice. 7 Barb. (N. Y.) 157; Meadow Co. v. Shrewsbury Church, 22 N. J. L. 424; Fitch v. Packard, 5 Ill. 69; Penobscot R. R. Co. v. White, 41 Me. 512; Penobscot, &c., R. R. Co. v. Dunn, 39 id. 587; White Mountain R. R. Co. v. Eastman, 34 N.H. 124; Fitch v. Pinkard, 4 Swan (Tenn.), 69; People v. Oakland County Bank, 1 Doug. (Mich.) 282; Conn., &c., Life Ins.

holders,[2] and in actions against it,[3] as to prove the organization of the company,[4] to show who are stockholders,[5] to show that a call was made, and its amount,[6] to prove the acceptance of its charter or amendments thereto,[7] to show what resolutions were passed or votes were taken at a meeting either of the stockholders or directors,[8] and who were elected as directors, etc., of the corporation.[9] But the evidence afforded by the books is not conclusive,

Co. v. Schenck, 94 U. S. 593; Hagar v. Cleveland, 36 Md. 476; Hudson v. Carman, 41 Me. 84.

[2] Chase v. Sycamore, &c., R. R. Co., 38 Ill. 215; Graff v. Pittsburgh, &c., R. R. Co., 31 Penn. St. 489; Wheeler v. Walker, 45 N. H. 355; Union Canal Co. v. Slayd, 4 W. & S. (Penn.) 393; New England Mfg. Co. v. Vandyke, 9 N. J. Eq. 498.

[3] The records of a corporation are always admissible against it. Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va., 1905), 50 S. E. 890; Tuskaloosa v. Wright, 11 Ala. 230; N. E. Mfg. Co. v. Vandyke, 9 N. J. Eq. 498; Philadelphia, &c., R. R. Co. v. Hickman, 28 Penn. St. 318. The book of minutes of a corporation is only *prima facie* evidence of the correctness of the entries made in it, and the appearance of the entries may, of itself, raise so strong a suspicion against the regularity of the proceedings, that no weight will be given to them. Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. 137. And they are not evidence of an agreement alleged to have been made by the stockholders as individuals, and not intended to bind the corporation. Black v. Shreve, 13 N. J. Eq. 455. Nor are they admissible against a member of the company, as evidence of his private contracts or dealings with the company. In respect to them, he is to be regarded as a stranger; nor indeed are they evidence in any case, unless it appears that they have been kept by the proper officer of the corporation. Haynes v. Brown, 36 N. H. 545. The receipt book of a corporation, containing entries of payments by a member, is evidence *against* the company, without producing the officer by whom they were countersigned, and are not to be rejected because they furnish evidence of other payments than those for which they are properly admissible in evidence. North America, &c., Assoc. v. Sutton, 35 Penn. St. 463. Entries of credit on the books for stock assigned, are worthless if founded on a transfer which did not discharge the assignor's liability. Hays v. Pittsburgh, &c., R. R. Co., 38 Penn. St. 81. Any person who saw the entries made in the corporation books, though he is not the secretary, can verify the books. St. Lawrence, &c., Co. v. Paige, 1 Hilt. (N. Y., C. P.) 430.

[4] Hudson v. Carman, *ante;* Grays v. Lynchburgh, &c., Turnpike Co., 4 Rand. (Va.) 578; Ryder v. Alton, &c., R. R. Co., 13 Ill. 516; Buncombe, &c., Turnpike Co. v. McCarson, 1 D. & B. (N. C.) 306; Wheeler v. Walker, 45 N. H. 355.

[5] In re St. George Steam Packet Co., 3 De G. & S. 31; Company of Carpenters, &c., v. Hayward, 1 Doug. 373; Collins v. Maule, 8 C. & P. 502. In an action to recover a subscription to a corporation, the subscription books are not only competent, but generally the only evidence by which the liability can be established. Marsh v. Colnett, 2 Esp. 665; Peake v. Wabash R. R. Co., 18 Ill. 88; Partridge v. Badger, 25 Barb. (N. Y.) 146.

[6] Barington v. Pittsburgh, &c., R. R. Co., 34 Penn. St. 358; White Mountain R. R. Co. v. Eastman, 34 N. H. 124.

[7] Coffin v. Collins, 17 Me. 440; Hudson v. Carman, *ante.*

[8] Motgomery R. R. Co. v. Hurst, 9 Ala. 513; Alabama, &c., R. R. Co. v. Nabors, 37 Ala. 489.

[9] Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194.

but may be impeached by any competent evidence.[10] The record must be of present transactions. Thus a record in a corporation book containing a directors' certificate reciting that certain assets had been accepted by the corporation is a recital of a past transaction and not admissible as an entry in a book of account kept in the regular course of commercial business and the fact that the minute was made in the record book of the corporation gives it no additional force as it is a mere self-serving narration of past events.[11] A trustee in bankruptcy of a corporation is a lawful custodian of its books and therefore when he produces them in court they come from the proper custody and if they appear from inspection to be the books of such corporation and to be free from suspicion or fraud they are admissible, and it is immaterial whether it be directly shown that the books were received by the trustee from the proper custodian of the corporation. The books do not prove themselves, but when they are produced by an officer of the corporation, who is shown to be the proper custodian of the books, and who testifies that they are the original, and the court by inspection becomes satisfied that there is nothing in the books to raise a suspicion of fraud, the identification is sufficient to admit them in evidence. Mere proof that the entries therein are in the handwriting of an officer of the corporation does not seem to be sufficient identification, unless it appears that it was the duty of such officer to make the entries.[12]

While it is the general rule that books of a corporation are not evidence in actions in its favor against strangers,[13] yet this is not always true, and in some instances the rule is departed from.[14]

[10] Goodwin v. United States Annuity, &c., Co., 24 Conn. 591.

[11] Norman Printers Supply Co. v. Ford (Conn., 1904), 59 A. 499.

[12] Lowry Nat. Bank v. Fickett (Ga., 1905), 50 S. E. 396.

[13] Chase v. Sycamore, &c., R. R. Co., 38 Ill. 215; Hagar v. Cleveland, 36 Md. 476; Conn. Life Ins. Co. v. Schenck, 94 U. S. 593; Jones v. Trustees, &c., 46 Ala. 626.

[14] The records of a corporation are always admissible against it as admissions as those of a private individual would be. But the declarations of a corporation as contained in its books are not evidence in its favor on a question of title, as for instance to show that a corporation had taken a certain location under statutory authority. The books in such case can be used only as memoranda to assist the memory of the corporation officers who know the facts. The court in discussing the admissibility of corporation books holds that they are properly admitted in controversies between stockholders on considerations of convenience, and also of sound legal principle as the stockholders having the right to inspect the books must be presumed not to allow an improper entry to remain there and the officers may be considered their agents. The court is at a loss to explain the

There are instances, however, in which the books of a corporation are not only admissible, but are also regarded as the best evidence of the facts to be established, even in actions between strangers. But where a stock exchange corporation is a private corporation its books are not admissible as evidence in a suit to which the corporation is not a party except as supported by the testimony of the person who wrote the books if he is alive and can be produced.[15] But the exception to the rule is limited. Thus, they are the proper evidence of its corporate acts, and while they are in existence and can be produced, parol evidence is inadmissible to prove the acceptance of the charter, or what persons are members of the corporation.[16] So where it be-

principle on which the corporation books are admitted in a suit by a corporation against a stockholder to prove his membership in the corporation and the court finds that in very few of these cases was such evidence admitted as *prima facie* proof. In many other cases their books are admitted simply to establish a *de facto* corporation, but these uses of corporation records do not establish the principle that a corporation may introduce self made and self serving entries upon its books to prove title or any other matter directly in issue between it and a stranger. Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va., 1905), 50 S. E. 890. To the effect that the books of a corporation are not admissible in its favor in a suit by it against a stockholder see Trainor v. German-American Savings Loan & Building Ass'n, 204 Ill. 616, 68 N. E. R. 650.

[15] Terry v. Birmingham National Bank, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87, where the court seems to uphold the view that such books are admissible only as admissions by the corporation, unless they are proved as a memorandum of a witness.

[16] Coffin v. Collins, 17 Me. 440. If, however, no books have been kept, or if they are lost or destroyed, or cannot be obtained by the party having the affirmation of the issue, acceptance of the charter may be proved by the acts of the alleged members of the corporation. Hudson v. Carman, 41 Me. 84. In an action between third persons the records of the corporation need not be produced to prove the authority of the president to do a certain act, but it may be shown by other evidence. But so, too, it may be shown by the records. Cabot v. Given, 45 Me. 144. And the same rule prevails as to the appointment and authority of a cashier of a bank, and of deposits made in the bank. Concord v. Concord Bank, 16 N. H. 26. And this is so, even though the charter provides that the signature of the president, attested by the secretary, shall be taken as full evidence of the doings of the corporation. Hankins v. Shoup, 2 Ind. 342. The by-laws of a corporation, when they have been written out and recorded in the books of a corporation, may be proved by the books. But when they rest in parol, they may of course be proved by parol. Thus by the charter of a bank the president and directors were authorized to make all such by-laws and regulations for the government of the corporation, its officers and members, as they or a majority of them should from time to time think fit. In an action by the bank, upon a certain writing being given in evidence, headed "By-Laws," and which purported to have been the by-laws of the bank while its business was transacted under articles of association and before the act incorporating it was passed, it was objected that there was no evidence that the writing produced had been

comes important to show that a certain resolution was passed at a meeting of the stockholders or directors, the records, if any, must be produced, or notice to produce them must be given before secondary evidence of their contents will be admitted.[17] So where the charter provides that certain agents or officers shall be appointed by writing, the books of the corporation are admissible, in the absence of the written appointment, to prove the appointment, but when the statute does not require the appointment to be made in writing, and it does not appear to have been so made, it may be proved by parol.[18] So if in actions between third persons the question is, as to whether a certain person is a stockholder of a certain corporation, the stock-books of the corporation not only are admissible, but, as a rule, should be produced, or their contents in that respect shown, where the party cannot produce them. And especially is this the case where the charter or general law provides that all transfers shall be made upon the books of the corporation.[19] But books of a corporation are as to matters pertaining to the dealings of the corporation with one of its members as an individual not books of a public nature. So in a suit by a corporation to enforce an indebtedness of a member the books are

adopted as the by-laws of the corporation, there being no entry or memorandum of such adoption among the minutes of its proceedings. It was held, 1. That, the authority to make by-laws being specially delegated to the president and directors, and no particular mode of exercising it being prescribed by the charter, it was no more necessary that their adoption should be in writing, than the acts or contracts of any other duly authorized agents; 2. That, it being proved by the cashier that the by-laws in question were always reputed to be the by-laws of the corporation, and with the exception of two articles were so observed by him; and by a director, that they were delivered to him as such upon his election, and that decisions by the board of directors were made agreeably to them in any question upon their conduct, this was a sufficient adoption of the by-laws by the president and directors. Md. Ct. of Appeals, 1827, Union Bank of Maryland v. Ridgely, 1 H. & G. (Md.) 324. The records of a school district are proper and legitimate evidence of votes for such district, in a suit to which it is a party. South School District v. Blakeslee, 13 Conn. 227.

[17] Montgomery R. R. Co. v. Hurst, 9 Ala. 513.

[18] Hamilton v. Newcastle, &c., R. R. Co., 9 Ind. 359.

[19] Coffin v. Collins, *ante*. But see Hare v. Waring, 3 M. & W. 362. Where a book is made by statute *prima facie* evidence of proprietorship of shares in the corporation, it is admissible as such, though it has been irregularly kept, London Grand Junction Railw. Co. v. Freeman, 2 M. & G. 606; Birmingham, &c., Railw. Co. v. Locke, 1 Q. B. 256; and is even evidence for the company in an action for calls. See London & Brighton Railw. Co. v. Fairclough, 3 Scott N. R. 68; London & Grand Junction Railw. Co. v. Graham, 1 Q. B. 271.

admissible only when brought within the rule admitting private books of account.[20]

In some of the states, by statute, these books are made admissible for certain purposes as *prima facie* evidence; but even in those cases they may be controverted by other proof, and omissions therein may be supplied by parol.[21] When the books of a corporation are admissible as evidence, if there is nothing on their face to raise a suspicion that the corporate proceedings have been irregular, they will be treated and referred to as evidence of the legality of its proceedings. Thus, where, by the statute, a certain proportion of the corporators were required to be present at a meeting to pass a certain vote, it was held that a statement in the record that "upon due invitation the corporators met, etc.," amounted to evidence that the requisite number were present.[22] The books of a corporation are not evidence to prove a usage, by entries of acts of submission by particular persons to the exercise of rights insisted on, without proof *aliunde* of the situation of those persons and their relative position in reference to the corporation.[23] The books of a banking corporation have been held admissible as evidence in a suit on a note brought by the bank against the indorser, a stranger, to prove the election of its officers; and this was held sufficient, *prima facie,* to show that the bank had complied with the previous requisitions of their charter, and that it had a legal existence.[24]

The books of a corporation have been allowed as evidence for them, in suits against strangers, in aid of the testimony of a witness who had made an entry therein, the truth of which was in question.[25] This seems, however, to have been upon the principle which allows memorandums, made of a transaction at the time, to go to the jury, under certain circumstances, along with the testimony of the person who made it. The court slightly advert also, in support of their decision, to the doctrine allowing previous consistent declarations of a witness to be given in evidence in corroboration of his oath. In this respect the entries in the books of a corporation

[20] Trainor v. German-American Savings Loan & Building Ass'n, 204 Ill. 616, 68 N. E. R. 650.

[21] Thorne v. Travellers' Ins. Co., 80 Penn. St. 15; Laymouth v. Koehler, 35 Mich. 22; Reynolds v. Schwimpus, 27 Ohio St. 311; Board of Education v. Moore, 17 Minn. 412.

[22] Com. v. Wallper, 3 S. & R. (Penn.) 29; Wood v. Jefferson Co. Bank, 9 Cow. (N. Y.) 194; Grays v. Turnpike Co., 4 Rand. (Va.) 578.

[23] Davis v. Morgan, 1 Price, 77.

[24] Wood v. The Jefferson Co. Bank, 9 Cow. (N. Y.) 194, 205; State v. Buchanan, 1 Wright (Ohio), 233.

[25] Farmers & Mechanics' Bank v. Boraet, 1 Rawle (Penn.), 152.

would obviously stand upon the same footing as a similar entry in a tradesman's book. And there are many cases where the entries in the books of banks have been both admitted and rejected, upon grounds which are well applicable to books of individuals. The books of incorporated banks, etc., stand upon a different footing, generally, in this country, from the books of the Bank of England. The former are not public books, in the sense in which that term is understood by the courts, except as among the members of the corporation. In other cases, the rules of admissibility in regard to them, as well as the mode of authenticating entries in them, are not essentially variant from those which relate to books of a mere private nature.[26]

The corporation of a city, and municipal corporations generally, differ from a private corporation in respect to the matters we are considering. An agent of the corporation of the city of New York, for instance, sued for acts done by order of the corporation, in removing obstructions in a street, may, in his *individual capacity*, avail himself of the minutes and books of the corporation in his defense. "It" (the corporation of the city) "more nearly resembles," say the court, adverting to the distinction noticed, "the legislature of an independent State, acting under a constitution prescribing its powers. The acts of this corporation concern the rights of the inhabitants of the city; it exercises a delegated power, not for its own emolument, but for the interests of its constituents; and while it keeps within the limits of its authority, the constituents are bound by the acts of the corporation. When the citizen wishes to show those acts, he must resort to the authentic record of them, which is the original minutes of the corporation." This, it seems, is the best evidence.[27]

The official tax-books of the corporation of the city of Washington, made up by the register, from the original returns of the assessors laid before the board of appeals, are evidence to show the tax assessed upon an individual; the assessors' original returns need not be produced.[28] "The book was made out by an officer, in pursuance of a duty expressly enjoined by law. This not only makes the tax-book evidence, but the best evidence which can be

[26] Ridgway v. Farmers' Bank of Bucks County, 12 S. & R. (Penn.) 256; The Philadelphia Bank v. Officer, 12 S. & R. (Penn.) 49; Courtney v. The Com., 5 Rand. (Va.) 66.

[27] Denning v. Roome, 6 Wend. (N. Y.) 651.

[28] Ronkendorf v. Taylor's Lessee, 4 Pet. (U. S.) 349.

given of the facts it contains." In Kentucky, the minutes of the trustees of Louisville and other towns in the commonwealth are competent evidence on trials as to town property. But there is no provision authorizing their verification by the clerk's certificate. It would seem to follow then, say the court, that they ought to be verified by oath, and proved to be true copies from the real book of the trustees, kept by the proper officer and recognized by the board as such.[29] But on writ of error, unless the objection to the admissibility in the court below was distinctly on the ground that the paper was not sufficiently authenticated, the court will not notice it, but will only rgeard the objection as one of relevancy or competence.

In Virginia the statute vested certain trutsees with one hunderd acres of land to be appropriated partly as a present to settlers and partly for the benefit of the proprietors; held that the books and other records of the trustees, called in the case a corporation, being first shown to be in the handwriting of the proper officers of the board, were admissible in evidence. The court said the trustees were established for public purposes; and their books were the best evidence of their acts and proceedings.[30] And in Massachusetts, a proprietary book of ancient date has been held admissible, without proving the entries by the clerk of the proprietors who made them.[31] The sales book of the proprietors of Cincinnati has been admitted as to early sales.[32] An ancient book of records of the town of Boston, entitled the Book of Possession, which, although not regularly authenticated, had been preserved among the records of the town, was held competent and sufficient evidence to establish ancient titles under allotments from the town.[33] A book of the proprietors of common lands was allowed in evidence in tracing title, on a witness stating that it had been formerly in the possession of his grandfather, whose executor had it thirty years, and then delivered it to the witness; the presumption from lapse of time being, say the court, that the witness had the lawful custody of it, and there being no evidence of the present existence of the proprietary with a clerk to keep the books and records; and

[29] Dudley v. Grayson, 6 Mon. (Ky.) 259.

[30] Owings v. Speed, 5 Wheat. (U. S.) 420.

[31] The Proprietors of Monumoi v. Rogers, 1 Mass. 159; Pitts v. Temple, 2 id. 538.

[32] Williams v. Burnet, 1 Wright (Ohio), 53.

[33] Rust v. The Boston Mill Corporation, 6 Pick. (Mass.) 158.

there being no place appointed by law for the deposit of such books when a proprietary becomes extinct.[34] The town record books, in New Hampshire, may be used by selectmen in justifying their doings as such, to show their appointment by a meeting of the inhabitants; and also to show a tax voted at such meeting.[35] The record of the appointment, and proof that the selectmen had acted under it, was held in this case proper evidence to be submitted to the jury, as in favor of the selectmen, from which to infer that the meeting, at which the selectmen were appointed, was a legal one in all respects.[36] It seems that a record like the above, when erroneous, may be amended by the clerk so as to conform to the truth, by motion to the court on behalf of the selectmen.[37] The chest of an incorporated company, kept by their clerk for the time being, is the proper custody for old documents relative to the admission of freemen and other acts of the company; but the private house of a former deceased clerk is not the proper custody for a convention dated in the reign of Edward IV, between the then Prince of Wales and the corporation.[38] The book of a corporation must in general be identified; and it must be shown that the book was kept and the entries were made by the proper officer, or some other person in his necessary absence.[39] It is not enough that the book is in the handwriting of a person stated therein to be secretary, and that the witness producing it received it from such person.[40] Nor is it sufficient merely that the book is proved by a former secretary or clerk to have been handed down to him as the corporation book.[41] In England, mere sworn copies of the books of the Bank of England are evidence. It is otherwise, as a general rule, in respect to the books of banks in this country. In *assumpsit* against a bank on a bill drawn by its president, his authority to draw was denied. To prove one item in his case, the plaintiff offered examined copies from the discount-book of the Bank of Pennsylvania, a third person. It was held inadmissible, as the original should be produced. The court denied that this came

[34] Tolman v. Emerson, 4 Pick. (Mass.) 160.

[35] Bishop v. Cone, 3 N. H. 513; McFadden v. Kingsbury, 11 Wend. (N. Y.) 669.

[36] Bishop v. Cone, *ante*.

[37] Well v. Battelle, 11 Mass. 477; Taylor v. Henry, 2 Pick. (Mass.) 397.

[38] Shrewsbury v. Hart, 1 C. & P. 114.

[39] Highland Turnpike Company v. McKean, 10 John. 154; Gaines v. The Tombeckbee Bank, 1 Ala. 50.

[40] Highland Turnpike Company v. McKean, *ante*.

[41] Martin v. Gunby, 2 H. & J. (Md.) 248.

within the rule that where an original is of a public nature and admissible in evidence, an examined copy is evidence *per se*. To make it admissible, if so at all, there must be proof that the original was made by an officer of the bank; the officer himself to prove this, if to be found; and if not, his handwriting to be proved. The court admitted the contrary rule as to the Bank of England, but said that their books are truly of a public nature. But to give that name to the books of the Bank of Pennsylvania, and on the same principle to those of incorporated insurance companies, etc., with which the country has been inundated, might produce serious consequences. "We know," say the court, "that these books are often badly kept; and it would be dangerous to admit copies in evidence when the originals may be easily had; nor should the originals be admitted without proof by whom the entries were made."[42] In another case, it was held that the entries in a book of an incorporated bank were not admissible, as between third persons, to show a deposit of money, unless it be first proved that the clerk who made the entries was dead, or beyond the reach of the process; and this, though it was admitted that the entries in question were made by J. M., who was clerk at the time. The rule has subsequently been laid down thus: "I take it to be a general and established principle, that neither copies of the books of an incorporated bank, nor the books themselves, are admissible against any other than the bank, or without proof being first made by whom the entries in the book were made; and that the proper witnesses to make such proof are the clerks by whom the entries were made, if to be found within the jurisdiction of the court; but if dead or out of the jurisdiction of the court, proof may be made of their handwriting."[43] It seems, however, according to those cases, that where a bank is located at a great distance from the place of trial, or where the books are required to be in different places at the same time, an examined copy from the books, with proof that the original entries were made by an officer of the bank (proved by himself, if to be found, and if not, with proof of his handwriting), would be competent evidence. Mere certified copies would not be admissible, unless rendered

[42] Ridgway v. Farmers' Bank, 12 S. & R. (Penn.) 256.

[43] Philadelphia Bank v. Officer, 12 S. & R. (Penn.) 49; Goehenauer v. Goad, 3 Penn. 244.

so by statute.[44] In Massachusetts, it has been said that clerks of religious and other corporations, and other recording officers, may certify copies of their records; and in doing so, act under the obligation of an oath of office, and their certificates are evidence.[45] The general rule, however, is otherwise, and, unless through the intervention of a statute, mere certified copies of corporation records and minutes are inadmissible.[46] The proceedings of churches and ecclesiastical bodies generally may be proved by parol, though minutes are kept of them by their clerks;[47] and in the case last cited the minutes of a presbytery were held evidence to prove certain facts, *e. g.*, the suspension of a minister, on due complaint made, but not to show the facts upon which it was founded. The record of a certificate of incorporation of a religious society is not evidence of the fact of incorporation. The certificate itself must be produced.[48] Where it was referred to the court to determine whether a book produced was the record of a church, it appearing that during the whole time it was kept, the ministers of the parish and pastor of the church kept it wholly or principally, he being the proper officer to keep such a record; and being kept in the form of a record, and containing a regular statement of the admission of members, the choice of officers, and the transaction of the regular business of the church; held that such book was to be considered the record book of the church.[49] The receipt book of a corporation, containing entries of payments by a member, is evidence against the company, without producing the officer by whom they were countersigned. Such entries are not to be rejected because they furnish evidence of other payments than those for which they are properly admissible in evidence.[50] But entries in the books of an incorporated company are not evidence against a member of the company, in respect of a contract entered into by him with the company, although the act by which the company is incorporated authorizes each member to inspect and take copies of the books or any part of them. So, although the

[44] Hallowell, &c., Bank v. Hamlin, 14 Mass. 178.

[45] Oakes v. Hill, 14 Pick. (Mass.) 442; Sawyer v. Baldwin, 11 id. 494; Stebbins v. Jennings, 10 id. 188.

[46] Dudley v. Grayson, 6 Mon. (Ky.) 259; Hallowell, &c., Bank v. Hamlin, 14 Mass. 178.

[47] Charleston v. Allen, 6 Vt. 633, 639; Dow v. Hinesman, 2 Aik. (Vt.) 18; Riddle v. Stevens, 2 S. & R. (Penn.) 537.

[48] Jackson v. Leggett, 7 Wend. (N. Y.) 377.

[49] Sawyer v. Baldwin, 11 Pick. (Mass.) 492.

[50] North American Building Association v. Sutton, 35 Penn. St. 463.

entries relate to transactions at a meeting at which such member was present, it appearing that the entries were made after the meeting had terminated, from memoranda made by the clerk at the meeting.[51] Nor are the minutes of a corporation evidence of an agreement alleged to have been made by stockholders as individuals, and not intended to bind the corporation.[52]

[51] Hill v. Manchester Water Works Co., 2 N. & M. 573.

[52] Black v. Shreve, 13 N. J. Eq. 455.

CHAPTER XIII.

Entries Made in Course of Business; Shop and Account Books.

Section 126. Admissibility of, generally.
127. Rule when better evidence exists.
128. Rule in different States.
129. Effect of alterations, etc.; of what things they may be used as evidence.
130. Of what things they are not evidence.
131. What are proper subjects of book charge.
132. Proof of and manner of making entries. Transcriptions.

Sec. 126. Admissibility of, generally.

The admission of account books and other records kept in the regular course of business is a portion of the law of evidence now in a state of transformation. In the days when the hearsay rule was first conceived business was done in a small competitive way by traders with a limited number of clerks and it was no hardship to require them to support their books by the testimony of those who knew the facts and made the entries. But this is often impossible to the great corporations of the twentieth century. Where a company has in its employ an ever-changing force of thousands of men and a score of bookkeepers, the duties of each so narrow that it might require a dozen witnesses to prove the payment of a single dollar, the strict application of the hearsay rule might often require a denial of justice. The more progressive courts are realizing more and more that they are not living in the days of Littleton and Coke, nor even of Lord Mansfield; that they are facing problems which these former leaders knew not of and that the law in this particular, as in all others, must grow with the fabric of the commercial world. They may cloak the change in a new application of the best evidence rule, but it is a change, and one to which the necessities of modern business are driving them on. The new rule may be that a document is admissible coming from the proper custody made in the regular course of business by one whose duty it was to make it, with no incentive to mis-

represent, even without the oaths of those who made the entries and knew the facts. No court has yet reached this goal, but it is submitted all are tending toward it and some of the recent decisions have blazed far the way towards its attainment.[1] It has always seemed to us that any rule which excludes original books of entry is one clearly opposed to sound policy and the ascertainment of the truth, and that the only really sensible rule is to admit such books in proper cases, *and leave it for the jury to say what degree of credit shall be given to them, in view of their appearance, the manner in which they are kept, and all the circumstances of the case, including the evidence in support of or in contradiction of the entries.* And this is practically the rule in several of the States. Thus, in Delaware a notched stick, accompanied by the oath of the party, is held to be a good book of original entries where it is the only method by which the party keeps his accounts,[2] and so are scraps of paper upon which items of debt or credit are originaly entered,[3] and the book of original entries kept by a party is evidence as to any matter which is a proper subject of book charge,[4] although some of the entries are falsified,[5] and although the account is kept by arbitrary signs like dots and crosses,[6] and where charges are originally made on a slate and transferred to a day book, the day book is treated as an original book of entries.[7] A book of accounts of original entries, although not always containing the material necessary for a complete account, if honestly kept, may be admissible as independent evidence where made in the usual course of business and showing

[1] See, for example, Fireman's Ins. Co. v. Seaboard Air Line Ry. (N. C., 1905), 50 S. E. 452, fully noted at p. 392, *post*.

[2] Rowland v. Burton, 2 Harr. (Del.) 288. And in Vermont the author once had occasion to put in evidence, as the book of original entries of a party, pieces of boards sawed out of the defendant's corn crib, upon which he had marked as delivered the number of bushels of grain which he had delivered to the plaintiff under a contract, to prove delivery, and, although objected to, the boards were admitted by PECK, J.

[3] Smith v. Smith, 4 Harr. (Del.) 532; Hall v. Field, 4 id. 533.

[4] Townsend v. Townsend, 5 Harr. (Del.) 126.

[5] Gosewich v. Zebley, 5 Harr. (Del.) 124. Nor do alterations or erasures. Sargeant v. Pettibone, 1 Aik. (Vt.) 355.

[6] Cather v. Dowerell (Neb., 1904), 99 N. W. 35.

[7] Place v. Baugher, 159 Ind. 232, 64 N. E. 852, where book was made up from temporary memoranda. See, also, Ewart v. Morrell, 5 Harr. (Del.) 126; Whitney v. Sawyer, 11 Gray (Mass.), 242; Barker v. Haskell, 9 id. 218; Morris v. Briggs, 3 id. 342; Faxon v. Hollis, 13 Mass. 427; Gibson v. Bailey, 13 Met. (Mass.) 537; Smith v. Sanford, 12 Pick. (Mass.) 139. But see Ogden v. Miller, 1 Browne (Penn.), 147; Forsyth v. Norcross, 5 Watts (Penn.), 432; Kessler v. McConahy, 1 Rawle (Penn.), 435, *contra*.

credits as well as charges made. The manner of keeping the accounts and their purpose is the important consideration, rather than the form of the books themselves.[8] There is a doubt whether this rule extends to memoranda made by the witness contemporaneously with the fact they purport to record. In New York they are held admissible and not in Massachusetts.[9] But in all cases the books must be supplemented by the oath of the party,[10] and the book alone is not sufficient to bind the party charged.[11] And substantially the same rules prevail in Connecticut, California, Vermont, Massachusetts, New Hampshire, Tennessee, Maryland, Louisiana, Pennsylvania, South Carolina, North Carolina, Virginia and several other States, either as a common-law rule or by virtue of express statutory provisions.[12] In all the other States such books are admissible under certain restrictions, which are generaly peculiar to each State. It would hardly be practicable here to point out in detail these peculiar restrictions, as they are of no consequence except to practitioners in the various States, who are presumed to be familiar with the rules in this respect in their own courts. In some of the States, particularly New York and Georgia, the admission of a party's books depends upon the circumstance whether better evidence of the facts can be had,[13] the rule being that such books are admissible upon proof by the party offering them; 1. That he kept no clerk, or else the clerk is dead, *or otherwise inaccessible;* 2. Upon proof that the book tendered is his original book of entries, his own oath being sufficient for this purpose; 3. Upon proof by his customers that he usually kept correct books; 4. Upon inspection by the court to see if the books are free from the suspicion of fraud.[14]

[8] Post v. Kenerson, 72 Vt. 341, 47 A. 1072, 82 Am. St. Rep. 948.

[9] Bates v. Preble, 151 U. S. 149, 155, 14 S. Ct. 277.

[10] Fitzgibbon v. Kenney, 3 Harr. (Del.) 317.

[11] Walker v. Yeatman, 5 Harr. (Del.) 267.

[12] Cook v. Swan, 5 Conn. 140; Stiles v. Hamin, 21 id. 507; Le Franc v. Hewitt, 7 Cal. 186; Landis v. Turner, 14 Cal. 573; Prime v. Smith, 4 Mass. 455; Ball v. Gates, 13 Met. (Mass.) 491; Faxon v. Hollis, 13 Mass. 427; Bassett v. Spofford, 11 N. H. 167.

[13] Bracken v. Dillon, 64 Ga. 243.

[14] Hull v. Carey, 5 Ga. 239; Slade v. Nelson. 20 Ga. 365; Merchants' Bank v. Taylor, 21 id. 334; Bailey v. Barnelly, 23 id. 582; Chastain v. Brown, 31 id. 346; Crawford v. Stetson, 51 id. 121; Petit v. Teal, 57 id. 145; Reaisor v. Powell, 61 id. 30. Now embodied in the Code, § 3777. In New York the rule is substantially the same as above, it being that, where there are regular dealings between the plaintiff and defendant, and it is proved that the plaintiff keeps honest and fair books of account; that some of the articles

Sec. 127. Rule when better Evidence exists.

In these States, as well as in some others,[1] the rule excludes the books when better evidence of the facts is attainable, and the books are admissible when, from necessity, they afford the best evidence of the facts contained therein.

charged to the defendant have been delivered to him; and that the plaintiff keeps no clerk, his books, from necessity, are admissible in evidence, for the consideration of the jury. Vosburgh v. Thayer, 12 John. (N. Y.) 461; Linnell v. Sutherland, 11 Wend. (N. Y.) 568; Tomlinson v. Borst, 30 Barb. (N. Y.) 42; Conklin v. Stamler, 2 Hilt. (N. Y.) 422; Foster v. Coleman, 1 E. D. Smith (N. Y.), 85; Houptman v. Catlin, id. 729; Morrill v. Whitehead, 4 id. 239. But where the party kept a clerk, proof of his decease is essential to let in the books, and the circumstance that he is out of the jurisdiction is not enough. Brewster v. Doane, 2 Hill (N. Y.), 537.

[1] Wheeler v. Smith, 18 Wis. 651; Eastman v. Moulton, 3 N. H. 556; Kennedy v. Fairman, 1 Hayw. (Tenn.) 458. In Texas the rule seems to be, that where a witness is called to prove a book of account, he should be inquired of as to the whole method of keeping the books, who made the different entries, etc., and if the testimony of such witness is insufficient to prove the account, other witnesses should be called; and when the plaintiff rests his case, the defendant may move to exclude all items not proved by competent evidence. Ward v. Wheeler, 18 Tex. 249; Burnham v. Chandler, 15 Tex. 441; Townsend v. Coleman, 18 Tex. 418; Taylor v. Coleman, 20 Tex. 772. In an action upon promissory notes given upon settlement of account, the defendants having pleaded in reconvention that the plaintiff was liable for certain book accounts due them which the plaintiff had undertaken to collect and apply to the notes sued on, it was held that, in the absence of evidence establishing such liability of the plaintiff, it was error to admit the account books in evidence without definite explanation of the use to be made of them by the jury. Compton v. Young, 26 Tex. 644. In South Carolina, where the entries in the plaintiff's book, which was offered in evidence, were, in part made from memoranda taken by his slave at the time of the delivery of the articles, and partly from memoranda made by defendants themselves, it was held that the entries were not admissible in evidence, and that the plaintiff was not a competent witness to prove them. Venning v. Hacker, 2 Hill (S. C.), 584. So the memorandum books of a peddler, in which he made his original entries for the most part in pencil, and carried about in his pocket, are not admissible in evidence as merchants' books of accounts. Thayer v. Deen, 2 Hill (S. C.), 677. And where a shopkeeper himself sold and delivered goods to a party, and during the same day the entries were made by another person, who occasionally acted as clerk for him, it was held that the book was no evidence of the debt, and that the evidence was inadmissible. Harris v. Caldwell, 2 McMull. (S. C.) 133. The books of a tradesman or mechanic are admissible in evidence only to prove the performance and delivery of work done within the mechanic's shop. Where the work is done outside of his shop, or on the premises of the party charged, such as building or repairing a house or any other fixture, there can be no necessity for books, for the work is apparent. St. Phillip's Church, 2 McMull. (S. C.) 306. Where A. verbally authorized B. to let C. have goods on his guaranty, and B. charged the goods to A. for C., in an action brought by B. against A. for the value of the goods, B. may verify his books by his oath, but cannot testify to anything further to establish

Sec. 128. Rule in different States.

As has been seen, the rules relating to the admission of books of account, in the different States, are not uniform. In some of them[1] the books are left to the jury, even though falsified or altered, to judge of the degree of credence to be given to them, while in others, indeed in most of the others, before the books can be admitted, they are to be submitted to the inspection of the court, and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded, and such also is the rule when they are manifestly altered or evaded, unless such alterations are explained.[2] If upon inspection by the court they appear to be fair and honest, and free from fraudulent practices and proper to be laid before the jury, the party is then required to make oath that they are the books in which the accounts of his ordinary transactions are usually kept,[3] and that the goods therein charged were actually delivered, or the money actually paid, or the services actually rendered, *and that the entries were made at or about the time of the transaction and are the original entries thereof, and that the sums therein charged have not been paid, except as indicated by the credits in the book.*[4]

A.'s liability. Brown v. Kinloch, 2 Spears (S. C.), 284. If a merchant's book of original entries shows that the goods charged to defendant were delivered to a third person, the entries, supported by the plaintiff's oath, are not, of themselves, enough to charge the defendant. The order, direction, or request of the defendant must be proved by other evidence. Kinlock v. Brown, 1 Rich. (S. C.) 223. So, where, to prove goods sold and delivered, the plaintiff, a merchant, produced his books, and testified "that his clerk reported to him the terms agreed upon by him and the defendant respecting the sale of the goods, and upon that report the witness made the entry; that he delivered the goods to a drayman, who told witness that defendant sent for them," it was held that the evidence was insufficient to support the action. Clough v. Little, 3 Rich. (S. C.) 353.

[1] Delaware, Gossenich v. Zibley, 5 Harr. (Del.) 124; Sargeant v. Pettibone, 1 Aik. (Vt.) 355.

[2] Churchman v. Smith, 6 Whart. (Penn.) 106; Cogswell v. Dalliner, 2 Mass. 217; Faxon v. Hollis, *ante;* Cole v. Anderson, 8 N. J. L. 68; Jones v. DeKay, 2 id. 695; Thomas v. Dyott, 1 N. & McCord (S. C.), 186. Time books kept with the men engaged in work upon a railroad are not admissible as evidence to show the cost or amount of such work *until it is shown that they were properly and correctly kept.* For v. St. Louis, &c., R. R. Co., 54 Iowa, 723.

[3] Fry v. Barker, 2 Pick. (Mass.) 65.

[4] Ives v. Niles, 5 Watts (Penn.), 324; Cogswell v. Dalliner, *ante.* In *Curren v. Crawford,* 4 S. & R. (Penn.) 9, it was held to be essention to this kind of evidence that the charges should be in such a state that they may be presumed to be the minutes of the daily business of the plaintiff. Where this appearance is wanting, the evidence is rejected as incompetent; and where it exists, and the book is admitted, the evidence remains liable to all objections suggested by unfair appearances of the particular account in

If the party is dead, his books may be admitted if they are shown by the suppletary oath of his executor or administrator to have come into his possession as the genuine books of account of the deceased, and he also swears that, to the best of his knowledge and belief, the entries therein are original and contemporaneous and unpaid.[5] It must also appear that the book is the registry of business actually done, and not of orders, executory contracts and things to be done subsequent to the entry;[6] and the entry must have been made for the purpose of charging the debtors with the debt, and not as a mere memorandum for some other purpose. Thus, a memorandum in a check book, upon the "stub" thereof, has been rejected, when cut from the book, and offered as evidence of the date, amount and tenor of the check.[7]

The scale books of a deceased surveyor are admissible to show the amount of bark taken from a certain tract although they do not show from what tract the bark noted was taken, where it is shown otherwise that the defendant owned no other tract in the vicinity from which bark was taken at the time of the record.[7a]

In most of the States, as has been before stated, even though the case is *prima facie* a proper one for proof by entries, if it appears either on the face of the charge or in any other way that there is, in fact, living or attainable proof of the item, independent of the entries, the latter are then inadmissible; for it being apparent that the ordinary common-law proof exists, which is superior in degree, that must be produced. It can only be dispensed with, and the entries received, where it is shown to be in truth beyond the reach of the party. The common case in New York is where the party has a clerk,[8] although one case seems to hold that the entire

issue, or from the whole book, or minutes, taken together, and which naturally affect the credibility of the evidence and must appear to have been made at or near the time of the transaction to be proved; and when the contrary is apparent, or is shown by proof, the books are inadmissible. But no precise time is fixed by law when the entry should be made. Jones v. Long, 3 Watts (Penn.), 326; Henry v. Oves, 4 id. 46; Fairchild v. Dennison, id. 258; Walter v. Bollman, 8 id. 544; Lonergan v. Whitehead, 10 id. 249; Cook v. Ashmead, 2 Miles (Penn.), 268; Thompson v. Bullock, id. 269.

[5] McLellan v. Crofton, 6 Me. 307; Prince v. Smith, 4 Mass. 455; Bentley v. Hollenbeck, Wright (Ohio), 169.

[6] Wilson v. Wilson, 6 N. J. L. 9; Terrill v. Beecher, 9 Conn. 344; Bradley v. Goodyear, 1 Day (Conn.), 104; Fairchild v. Dennison, 4 Watts (Penn.), 258.

[7] Watson v. Gadin, Wright (Ohio), 219; Cooper v. Morrell, 4 Yeates (Penn.), 341.

[7a] Hagerty v. Webber, (Maine, 1905), 61 A. 685.

[8] Vosburgh v. Thayer, 12 John. (N. Y.) 462.

entries may be received, though part were made by the clerk, and the rest by the party.[9] Nothing but the death of the clerk will let in the book.[10] Thus, in a North Carolina case, the clerk was absent in the West Indies, and in another,[11] the clerk was in South Carolina; yet such absence was held no excuse in either case. Some cases, however, allow the excuse that the clerk is permanently beyond the power of the court.[12] Upon the same principle, a schoolmaster's original entries are not proof; for he has usually many witnesses by whom to prove his services, and he must avail himself of them.[13] The analogy of these cases has been carried by authority into a variety of transactions; and the courts very judiciously appear determined to act on the same principle in regard to all matters forming the subject of evidential account books. True, in one case a lime burner and vendor's book was received to prove large sales of lime delivered out by servants and agents, where the party was generally present, either at the kiln, when the loads were placed in wagons, or else saw the delivery; and this, though he was absent on a very few occasions;[14] and in another case, entries made by the party from a memorandum of a servant were received.[15] If the goods were delivered to a third person on account of the vendee, the books are not evidence;[16] not even though they were the vendee's servants.[17] So, though the books of a printer are receivable, they are no farther so than to

[9] M'Allister v. Reab, 4 Wend. (N. Y.) 483. But *quere* as to such entries as appear to be made by the clerk; for other cases have, with a laudable jealousy of such self-fabricated evidence, adhered closely to the rule that where the entry is made by the clerk, nothing shall excuse his absence except his death. Kenedy v. Fairman, 1 Hayw. (N. C.) 458; Whitefield v. Walk, 2 Hayw. (N. C.) 24.

[10] Kenedy v. Fairman, 1 Hayw. (N. C.) 458.

[11] Whitefield v. Walk, *ante*.

[12] Sterritt v. Bull, 1 Binn. (Penn.) 234.

[13] Pelzer v. Cranston, 2 M'Cord (S. C.), 328.

[14] Curren v. Crawford, 4 S. & R. (Penn.) 3.

[15] Ingraham v. Bockius, 9 S. & R. (Penn.) 285. Yet the subsequent cases of Smith v. Lane, 12 S. & R. (Penn.) 80, and Kessler v. M'Conachy, 1 Rawle (Penn.), 441, both manifest a strong tendency to great strictness, and a conformity with the other cases in the State of Pennsylvania and elsewhere. But see Kaughley v. Brewer, 16 S. & R. (Penn.) 133. In a former case in that State, charges for work done by a servant were disallowed as evidence, the court saying such evidence was allowed from necessity, and where the work has been done by a third person, the necessity does not exist. He can prove it. "*Cessante ratione, cessat ipsa lex.*" Wright v. Sharp, 1 Browne (Penn.), 344. So, charges for work done by servants, for they are competent witnesses. Wright v. Sharp, 1 Browne (Penn.), 344.

[16] Kerr v. Love, 1 Wash. (U. S. C. C.) 172.

[17] Eastman v. Moulton, 3 N. H. 156.

prove the retainer to do the work; for the fees may be produced to show the *quantum,* and the price may be proved by others;[18] nor are a tailor's books receivable to prove goods delivered to the defendant's ward by the order of the defendant. Here they are mere proof of the delivery. Books are, in general, not allowed to prove a direction or instruction to deliver to a person other than the defendant.[19] The charge on its face purporting to be of goods delivered to another on the defendant's order, it was rejected as incompetent.[20] And where goods were delivered on written orders, an account was excluded as evidence, for that reason among others. The orders should be produced, or otherwise proved on accounting for their absence.[21] Where the goods are delivered out by another or by others, the account kept by them, or by one on their information, cannot be received; for the party has other proof by those who delivered the goods, and they must be produced, or their absence accounted for.[22] Where the charge was for medicine and attendance on an aged menial servant of the defendant, the plaintiff's book was received as usual; but it was held that the defendant's agreement to pay must be proved by evidence *aliunde.*[23] Yet charges for goods sold and delivered to, and services performed for one on account of another, have been sustained by the claimant's original entries in Connecticut, without showing the death or absence of the witnesses. But the question was not presented in the above points of views; and some reliance seems to have been placed on the statute of that State as controlling the case.[24] To be admissible at all, the entries should be made at or near the time of the transaction. The law fixes no precise instant. They are not to be registers of a past transaction, but memoranda of transactions as they occur,[25] and where some were made at the time and others some months after, without distinguishing which, or assigning a good reason, the whole were rejected as incompetent.[26] In an action for labor and materials furnished under contract, entries in the plaintiff's journal and ledger *made after the work was done,*

[18] Richards v. Howard, 2 N. & M'Cord (S. C.), 474.

[19] Deas v. Darby, 1 N. & M'Cord (S. C.), 436.

[20] Tenbroke v. Johnson, 1 N. J. L. 288; Townley v. Wooley, 1 id. 377.

[21] Smith v. Lane, 12 S. & R. (Penn.) 80.

[22] Smith v. Lane. *ante.*

[23] Coffin v. Cross, 3 Dane's Abr. 322.

[24] Bryan v. Jackson, 4 Conn. 288.

[25] Curren v. Crawford, 4 S. & R. (Penn.) 5; Ewing v. Sparks, 7 N. J. L. 59; Eastman v. Moulton, 3 N. H. 156; Cogswell v. Dalliner, 2 Mass. 217.

[26] Vann v. Feariss, 1 Yeates (Penn.), 321.

and not from his memorandum book, which had been introduced by the defendant, were held to be inadmissible in rebuttal of the latter.[27]

Sec. 129. Effect of Alterations, Etc.; of what Things they may be used as Evidence.

If the day book, journal, etc., contains marks, showing that the items have been posted into the ledger, the latter must also be produced.[28] Entries made in the manner stated are not, in all cases, received as satisfactory evidence of the matters stated, but only as proof of things which are not susceptible of better proof.[29] They are, however, satisfactory evidence of goods sold and delivered from a shop or store, or of services personally performed,[30] and, in some of the States, of the payment of small sums of money;[31] but a book containing only charges for money is not admissible as a book of accounts, even where the statute expressly makes the party's book of accounts admissible.[32]

Sec. 130. Of what Things they are not Evidence.

A party's books are never admissible to establish items which do not form the proper subject of book charges, which, in most of the States, embrace such items as are recoverable in general assumpsit, although in some of the States the rule has a much narrower application. Thus among matters which do not form the proper subject of book charges are embraced charges for advertising in a newspaper,[1] for money paid and not applied as directed,[2] of goods delivered to a third person,[3] for commissions upon the sale of a vessel,[4] for labor of servants,[5] for dockages of a vessel,[6]

[27] Bentley v. Ward, 116 Mass. 333.

[28] Prince v. Sweet, 2 Mass. 569.

[29] Watts v. Howard, 7 Met. (Mass.) 478.

[30] Easby v. Allen, 1 Cooke (Tenn.), 388; Case v. Patten, 8 John. (N. Y.) 211; Charleton v. Lowry, 1 Martin (N. C.), 26; Spencer v. Saunders, 1 Bay (S. C.), 119; Vosburgh v. Thayer, 12 John. (N. Y.) 461; Wilmer v. Israel, 1 Browne (Penn.), 257.

[31] Prince v. Smith, *ante;* Burns v. Fay, 14 Pick. (Mass.) 8; Dunn v. Whitney, 10 Me. 9.

[32] Parries v. Bellaeus, 52 Vt. 351.

[1] Richards v. Howard, 2 N. & McCord (S. C.), 474.

[2] Bradley v. Goodyear, 1 Day (Conn.), 104.

[3] Tenbrook v. Johnson, 1 N. J. L. 288; Townly v. Woolsey, 1 id. 377; Kerr v. Love, 1 Wash. (Va.) 172.

[4] Winsor v. Dilloway, 4 Met. (Mass.) 221.

[5] Wright v. Shoop, 1 Browne (Penn.), 344.

[6] Wilmer v. Israel, 1 Browne (Penn.), 257. Because they can testify to the services.

for money paid under a special agreement,[7] or a delivery of goods under such agreement,[8] an article omitted by mistake in a prior settlement,[9] the use and occupation of real estate, and the like.[10] So, such books are generally inadmissible to prove the loan of large sums of money, because transactions of this character are usually evidenced by promissory notes, checks and bills of exchange. But such items may be proved by the books of a banker or broker, when such is in pursuance of his ordinary business method.[11] Thus, a certain debit book containing an account of dealings in promissory notes written partly by the party himself and partly by his bookkeeper is admissible in evidence in his favor when verified by the oath of the party himself and his bookkeeper, as it is an account book of original entries, fair on its face and shown to be kept in the usual course of business.[12] In Massachusetts and Maine a money charge of over 40 shillings ($6.67) may not be proved by a book account.[13] An entry "Paid A $25.00, which settles to date as per agreement," is not a proper subject of book entry.[14] But after the order to deliver goods to a third person is proved by competent evidence *aliunde,* the delivery itself may be proved by the books and suppletory oath of the plaintiff, in any case where such delivery to the defendant in person might be so proved.[15] But the books of original entry of a consignor are inadmissible to show delivery of goods sent under a contract, although they would have been *prima facie* evidence of sale and delivery in the absence of a special contract.[16] The charges, moreover, must be specific and particular. A general charge for professional services, or for work and labor by a mechanic, without any specification but that of time, cannot be supported by this kind of evidence.[17] And regularly the prices ought

[7] Pritchard v. McOwen, 1 N. & McC. (S. C.), 131, *n.;* Dunn v. Whitney, 10 Me. 9; Green v. Pratt, 11 Conn. 205.

[8] Nickle v. Baldwin, 4 W. & S. (Penn.) 290.

[9] Punderson v. Shaw, Kirby, 150.

[10] Beech v. Mills, 5 Conn. 493; Newton v. Higgins, 2 Vt. 366; Dunn v. Whitney, 10 Me. 9.

[11] Harmon v. Decker, 41 Or. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748.

[12] Borgess Investment Co. v. Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567.

[13] Waldron v. Priest, 96 Maine, 36, 51 A. 235; Davis v. Sanford, 9 Allen, 216.

[14] Waldron v. Priest, 96 Maine, 36, 51 A. 235.

[15] Mitchell v. Belknap, 22 Me. 475.

[16] Hall v. Chambersburg Woolen Co., 187 Penn. St. 18, 40 A. 986, 67 Am. St. Rep. 563.

[17] Lynch v. Petrie, 1 N. & McC. (S. C.), 130; Hughes v. Hampton, 2 Const. Rep. (S. C.) 476.

to be specified; in which case the entry is *prima facie* evidence of the value.[18] But whatever be the nature of the subject, the transaction, to be susceptible of this kind of proof, must have been directly between the original debtor and the creditor, the book not being admissible to establish a collateral fact.[19]

Although books, such as have been described, are admitted to be given in evidence, with the suppletory oath of the party, yet his testimony is still to be weighed by the jury, like that of any other witness in the cause; and his reputation for truth is equally open to be questioned.[20] In some States, the books thus admitted are only those of shopkeepers, mechanics and tradesmen; those of other persons, such as planters, scriveners, schoolmasters, etc., being rejected.[21]

Sec. 131. What are proper Subjects of Book Charge.

Among matters which do form the proper subject of book charge, are *items for personal property sold and delivered,*[1] and this is the rule irrespective of the value of the property, or whether the charge embraces several, or only a single item.[2]

In order to be the proper subject of book charge, it is not in all cases necessary that the goods should be delivered to the person to whom they are charged or upon his express order. *It is sufficient if they are furnished to a person under such circumstances that the law will imply a promise, on the part of the person to whom they are charged, to pay for them.* Thus, as a husband is bound to furnish support for his wife and provide her with necessaries, and a father to supply his minor children with necessaries, or a guardian to provide his ward with necessaries out of the ward's estate, it follows that a person supplying such articles may properly charge them in acount to the person who is

[18] Hagaman v. Case, 4 N. J. L. 370; Ducoign v. Schreppel, 1 Yeates (Penn.), 347.

[19] Mifflin v. Bingham, 1 Dall. (U. S.) 276; Kerr v. Love, 1 Wash. (U. S.) 172; Deas v. Darby, 1 N. & McC. (S. C.), 436; Poultney v. Ross, 1 Dall. (U. S.) 238.

[20] Kitchen v. Tyson, 2 Murph. (N. C.) 314; Elder v. Warfield, 7 H. & J. (Md.) 391.

[21] Geter v. Martin, 2 Bay (S. C.), 173; Pelzer v. Cranston, 2 McC. (S. C.), 328; Boyd v. Ladson, 4 McC. (S. C.), 76.

[1] Shillaher v. Bingham, 3 Davies' Abr. 321.

[2] In Leach v. Sheppard, 5 Vt. 363, the only charge was 2,088 pounds of meal. In Shillaher v. Bingham, *ante*, the charges were for 78 bushels of salt and 132 gallons of rum.

legally bound to supply them, and being proper items of book charge, the book is evidence for the party supplying them.[3]

But it must be remembered that in order to warrant a charge upon book for property sold, *it must in all cases have been delivered,*[4] and the circumstance that the goods were ordered absolutely, but not delivered, will not let in the book containing a charge therefor as evidence, because, until an actual delivery is made, the contract is executory.[5]

So, too, in order to be a proper subject of book charge, *the right to charge for property delivered must exist at the very moment of delivery, and cannot arise afterwards from some special contract or circumstance.* Thus, money advanced to a person under a special contract to deliver goods therefor at a future day,[6] or property delivered to A. to be by him delivered to B., but which he appropriates himself,[7] cannot be made the subject of book charge. But in all the cases in which these questions arose, it will be observed that they arose in actions of "book account" in which, by statute, the parties were permitted to testify, and the principal objection urged against the admission of the class of charges last referred to was, that, to permit such charges to be made and sustained by the party's book and oath, would be permitting the party to testify as to special contracts, whereas the statute only contemplated his being permitted to testify to the quantity, quality and delivery of the articles in question;[8] and this seems to have been the ground upon which the decisions above cited were predicated. Whether the circumstance that, in most of the States, the parties to all classes of actions are now, by statute, permitted to testify in their own behalf, would change the rule relative to book charges, is a question which does not seem to have been decided.

Money loaned may properly be charged upon books, although memorandum notes are given for the amount, unless it is shown

[3] Mills v. St. John, 2 Root (Conn.), 188; Swift's Ev. 84.

[4] Howell v. Bardin, 3 Dev. (N. C.) 449; Read v. Barlow, 1 Aik. (Vt.) 145; 1 Vt. 97.

[5] Rhoades v. Gaul, 4 Rawle (Penn.), 404.

[6] Peck v. Jones, 1 Kirby (Conn.), 289.

[7] Slason v. Davies, 1 Aik. (Vt.) 73; Bradly v. Goodyear, 1 Day (Conn.), 104.

[8] Phenix v. Prindle, 1 Kirby (Conn.), 209; Terrill v. Beecher, 9 Conn. 349.

that the notes were given and accepted in extinguishment of the book debt.[9]

Services *performed* are a proper subject of book charge, in whatever capacity they may have been rendered.[10] Thus services rendered by an attorney,[11] a justice of the peace,[12] or indeed by any person in whatever capacity, where there is either an express or an implied promise to pay therefor.[13] And this is also the rule as to services rendered by horses, cattle, etc.[14]

But as, in the case of goods sold, it must appear that they were actually delivered before they can properly be charged on book, so in the case of services *it must be shown that they have been, actually performed.*[15]

Where an agreement by certain parties to loan certain sums of money to aid in the building of a hotel, provided that W. and others should be the attorneys in fact of the subscribers, empowered to contract with a suitable person to execute the purpose of the agreement, and collect and disburse the amounts subscribed, and they entered into a contract with S. to build such hotel, and W., who was a banker, was made their treasurer, it was held that the entries in the books of W. were not admissible to charge S. with the receipt of the subscriptions, in an action against him by a subscriber to recover the amount of an alleged payment. An entry in a book of accounts, which is the principal fact upon which the right to recover is based, is not admissible as being part

[9] Clark v. Savage, 20 Conn. 258. And it seems that this is the case, although the memorandum was taken as evidence of the loan. Boutwell v. Tyler, 11 Vt. 487; Smith v. Brush, 11 Conn. 359; Bill v. Porter, 9 Conn. 31; Arnold v. Greene, 8 John. (N. Y.) 79. If a charge upon book was not originally proper, the parties may make it so by their conduct, assent or agreement. Spear v. Peck, 15 Vt. 566; Daton v. Whitcomb, 17 id. 641. In Darlington v. Taylor, 2 Grant's Cas. (Penn.) 195, the court held that a shop book, even though the entries are not original, and some of the items not the subject of book charge, is competent evidence if it has been shown to the debtor without objection on his part.

[10] Hawell v. Barden, 3 Dev. (N. C.) 449.

[11] Waldron v. Priest, 96 Maine, 36, 51 A. 235; Charleton v. Lawry, 1 Martin (N. C.), 44; Bell v. McLean, 3 Vt. 185.

[12] Sargeant v. Pettibone, 1 Aik. (Vt.) 355.

[13] Minor v. Irving, 1 Kirby (Conn.), 158; Foy v. Slyfield, 3 Vt. 246; Bamers v. Dunn, 2 Root (Conn.), 59. But see Harbison v. Hawkins, 81 Penn. St. 142, where it was held that a charge by a notary public for services in taking depositions and the acknowledgment of a deed, were not proper subjects of book charge.

[14] Easly v. Eaken, 1 Cooke (Tenn.), 38; Boardman v. Keeler, 2 Vt. 65; Phenix v. Prindle, 1 Kirby (Conn.), 207.

[15] Hawell v. Barden, *ante.*

of the *res gestae*. In such case, certificates to subscribers issued by the attorneys in fact, acknowledging the payment of subscriptions to the loan, would not be competent to conclude S. therein. Nor would a receipt executed by S. to W. for a sum less than the whole amount subscribed, which did not specify the names of the parties from whom W. had received the money, be admissible to establish the fact that S. had received the amount pledged by any one subscriber.[16]

There are many matters which may become the proper subject of book charge by the agreement of parties, or by their usual course of dealings, which otherwise would not be; therefore when an item in an account is objected to as not being properly chargeable upon book, the party may show, if he can, that it was agreed between the parties that it should be so charged, *or that charges are warranted by the usual course of dealing between the parties.* Thus, where there is a special contract in writing between the parties, it cannot, nor any of its incidents, properly be made the subject of book charge, as interest accruing upon a note, contract, bond, etc.; *but if the parties so agree, or if such charges, relating to the same contracts between the same parties, have formerly been made upon the party's book, and settled by the other party without objection,* such charges afterwards made, as between the parties, and *growing out of the same contracts,* would doubtless be regarded as proper, and the same may be said as to rent for the use of lands, etc.,[17] because in such a case the parties have established a species of usage as between themselves which is operative until destroyed by the objection of the other party.

Nothing which grows out of a collateral agreement can be made the subject of book charges. Thus, where goods are furnished to A. under an agreement by B. to pay for them if A. does not, the goods cannot be charged to B. in account, but the remedy of the party is upon the special agreement.[18] Nor can any mere claim for damages arising out of a special contract or from neglect, default, or miscarriage of another, be made the subject of a

[16] Sypher v. Savery, 39 Iowa, 258.

[17] Case v. Berry, 3 Vt. 332; Beach v. Mills, 5 Conn. 493; Swing v. Sparks, 7 N. J. L. 59; Spear v. Peck, 15 Vt. 566; Darlington v. Taylor, *ante.*

[18] In Skinner v. Conant, 2 Vt. 75, this rule was adopted under a similar collateral agreement relating to services.

book charge,[19] nor can goods left with a person to be sold on commission,[20] nor damages arising from a tort.[21]

Sec. 132. Proof of and Manner of Making Entries. Transcriptions.

It is no objection to a book that the entries are made by the party from data furnished him by his workmen, *if he knows* the facts therein stated. Where memoranda as to inspections are made by subordinates and delivered to a bookkeeper who transcribes them on a ledger the ledger is not admissible in evidence of the original memoranda unless their absence is accounted for. If, however, they have been lost and the fact is satisfactorily shown then the fact of the inspection may be proven by calling the inspectors who made the memoranda in conjunction with the clerk who made the ledger in the usual course of business and the ledger would then become competent evidence to go to the jury.[1] Where payments are noted on slips and transcribed at the end of each week to corporation books, the books are admissible only when supported by the oath of the clerks who kept the slips and transcribed them.[2] An account book of a hotel kept by a clerk who had no personal knowledge of certain of the items and whose only knowledge was derived from slips sent to his office from certain departments by a bell boy is not sufficient evidence, as the original slips were not produced.[3] Books of an insurance company, supported by the testimony of the bookkeeper, are not admissible to prove items copied from applications for insurance as to which the bookkeeper had no personal knowledge, the applications themselves being the best evidence.[4] A register of patients at a private hospital is not admissible to prove the disease under which a certain patient was suffering when kept by a superintendent from doctors' reports as to the truth of which the superintendent, who testified to the register, knew nothing.[5] It is held

[19] Fry v. Slyfield, 3 Vt. 75; Farrand v. Gage, 3 Vt. 326.

[20] Brisch v. Hoff, 1 Yeates (Penn.), 198; Kerr v. Love, 1 Wash. (U. S. C. C.) 172.

[21] Swing v. Sparks, 7 N. J. L. 59.

[1] Manchester Assurance Co. v. Oregon R. R. & Navigation Co. (Ore., 1905), 79 Pac. 60.

[2] Trainor v. German-American Savings, L. & B. Ass'n, 204 Ill. 616, 68 N. E. R. 650.

[3] Gould v. Hartley, 187 Mass. 561, 73 N. E. 656.

[4] Union Cent. Life Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917.

[5] Price v. Standard Life & Accident Insurance Co., 90 Minn. 264, 95 N. W. 1118.

not to be sufficient identification of certain daily reports of cattle reloaded at a certain point that these reports were sent to the veterinarian stationed at the city to which the cattle were consigned and that he took them from the envelopes, they purporting to be signed by the "live stock agent." They were not registers or records but simply notification reports made to the inspector. They were not documents belonging to any public office nor was there any testimony that they were required to be kept and they were not shown to be sent by any official. The fact that the reports were customarily sent as to certain kind of cattle is insufficient.[6]

In North Carolina it has been held that where a train sheet is kept in the regular course of business by a train dispatcher, based entirely upon reports from various stations made to him by telegraph operators of the arrival and departure of trains, the train sheet may be used as evidence of the matters contained therein on the testimony of the official who kept it. It is undoubtedly the general rule that if the entrant and the person making the report upon which the entry is made are both living and available they should be produced to testify to the truth of the subject matter of the entry; that if one be living and available, and the other dead or unavailable,—that is insane or beyond the process of the court —the entry may be introduced upon the testimony as to its authenticity of the living, available person. The decision goes farther in holding the record admissible as a general principle when the entrant is living and the person upon whose report the entry is made is not produced nor his absence accounted for. The court founded its decision partly upon necessity, partly upon the fact that the entry was made in the regular course of business, that no motive to mislead existed and partly on the suggestion that the train sheets are *quasi*-public documents.[7] A book is re-

[6] Dorr Cattle Co. v. Chicago & G. W. Ry. (Iowa, 1905), 103 N. W. 1003.

[7] Fireman's Ins. Co. v. Seaboard Air Line Ry. (N. C., 1905), 50 S. E. 452. See, also, Donovan v. R. R., 158 Mass. 150.

In Curran v. Crawford, 4 S. & R. (Penn.) 3, the party saw his lime, in general, either loaded at the kiln or delivered to the vendees, but not always, and trusted to his wagoners for some of his charges; yet his book of charges for the lime was allowed to go to the jury. In another case, a butcher's servant, carrying out meat, uniformly marked in pencil the quantity delivered, which his master copied into his book on his return. The book was held receivable. In graham v. Bockius, 9 S. & R. (Penn.) 285. But see Smith v. Lane, 12 S. & R. (Penn.) 80. So, where one of two butchers (partners) customarily

ceivable as evidence, though the work be charged while in progress, and before it be completed; as where a tailor made his charges on the work being cut out and delivered to his journeymen, who worked in the same house with him. Such mode of keeping books as is usual and known to all tradesmen cannot safely be declared bad by the court. In some trades the work is in hand for several days, and goes through more than one hand; and the entry may be made during the period of its manufacture, or at a stated time when it has progressed a certain length. The court would not say a shopkeeper could charge goods not yet measured or weighed off, nor a tradesman work not yet begun; but they hesitated to say that a blacksmith who has prepared and weighed iron work, and then charges before he put it on the wood, which might take him a week, or a chairmaker who makes and paints the chairs and charges them before sent to be gilt, shall not read his book.[8]

The entry must be in the book of the party, kept by him for the purpose of his daily accounts, generally, with all those persons who may have dealings with him, and must be made in conformity to the prevalent manner of his keeping the book, and in a regular course with the other charges. If they stand isolated on the front leaf of the book, and not falling into a regular order with the other charges, they will be rejected.[9] So if on a separate sheet, especially when it appears that the party in fact keeps an account

marked the scores of meat with chalk on a cart, and the other, before the cart went out again, copied the scores into the book, it was held receivable, on the oath of both partners. Smith v. Sandford, 12 Pick. (Mass.) 139. It is no objection to the book, though the entries be first made on a slate and then transcribed by the party, if done in the ordinary course of his making such entries, Faxon v. Hollis, 13 Mass. 427; Kessler v. M'Conachy, 1 Rawle (Penn.), 441, though properly they should be transcribed daily; and where it was left in doubt, whether a day or two after, they were rejected; Ogden v. Miller, 1 Browne (Penn.), 147; and they will, of course, be rejected if it do not appear that the party made the entries on the slate, but it is left to be inferred that they were made by a servant, who could attest to them himself. Drummond v. Hyams, 1 Harp. (S. C.) 268. And where the journeyman made the entries, some of them on a slate, whence they were copied by the master—some in a day or two, some in a week, some perhaps not short of two weeks, without distinguishing which was longer or shorter, the book was held altogether inadmissible. And much stress was laid on there being better evidence—the journeyman himself; they should at least have been both made and transcribed at or about the time the work was done; and the party should distinguish the entries so made from those made more loosely, or the whole must be rejected. Kessler v. M'Conachy, 1 Rawle (Penn.), 441.

[8] Kaughley v. Brewer, 16 S. & R. (Penn.) 133.

[9] Lynch v. Hugo, 1 Bay (S. C.), 33.

book.[10] So of a mutilated piece of paper, which appears to have been torn out of a book, in which the name of neither party appears, which contains no charges against the defendant, and which is unintelligible without explanation by the plaintiff.[11] Where six charges, amounting to six hundred and fifty dollars, were on one of the last leaves of the book, separated from all the entries by intervening blank leaves, and dated during the same period with thirteen other charges made in the body of the book, apparently regular, the six charges were held properly to be no part of the book, and inadmissible, the same as entries on a separate leaf.[12] Charges on several disconnected pieces of paper were rejected.[13] After the defendant's demand accrued against the plaintiff, the latter caused a series of charges to be continuously written down in his regular book against the defendant, ranging through several years, without a single intervening charge. The book was held clearly inadmissible as evidence of such charges.[14] But in Vermont, an entry of a service as counselor at law on a separate slip of paper, filed according to the party's usual practice, was received.[15]

To make the book admissible for any purpose, it must contain the original entries of the party made by himself, and must be an account of his daily transactions.[16] An account book kept by a deceased party, the entries in which are contemporaneous with the facts recorded, is admissible in evidence.[17] In Indiana a party may read his day books to the jury when he made them up from day to day from temporary memoranda as to the number of feet of timber delivered, as the books are then part of the *res gestae*.[18] And one reason why they must not appear to be made by another is, because he is then *prima facie* a witness, and must be produced.[19] But regard is had to the party's degree of education, and if he cannot write so as to make entries, they may be

[10] Prince v. Smith, 4 Mass. 455.
[11] Hough v. Doyle, 4 Rawle (Penn.), 291.
[12] Wilson v. Wilson, 4 N. J. L. 94.
[13] Thompson v. McKelvey, 13 S. & R. (Penn.) 126.
[14] Swing v. Sparks, 7 N. J. L. 59.
[15] Bell v. M'Lean, 3 Vt. 185.
[16] Curren v. Crawford, 4 S. & R. (Penn.) 5; Sterritt v. Bull, 1 Binn. (Penn.) 237; Prince v. Smith, 4 Mass. 455; Eastman v. Moulton, 3 N. H. 156; Swing v. Sparks, *ante;* Karr v. Stivers, 34 Iowa, 123; Marsh's Case, 30 Wis. 531.
[17] Railway Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202.
[18] Place v. Baugher, 159 Ind. 232, 64 N. E. R. 852.
[19] Eastman v. Moulton, 3 N. H. 156.

made by another.[20] If it clearly appear that the entries are not original, either upon inspection or from extrinsic testimony, they are to be withheld as incompetent evidence.[21] Being original entries, the question arises upon the form in which they are to be kept. Among the European continental nations, which have adopted the civil law as the basis of their own, this proof by book account also prevails. If we judge of its form from the French Code, and the more approved French writers on jurisprudence, who confine it to merchants of good standing, it will be seen that the avenues to abuse are partially closed by the cautious manner in which accounts must be arranged and checked in order to give them the character of competent proof.[22] Yet the book itself is not such evidence as will warrant a sentence in favor of the party producing it.[23] It is but semi-proof, which may be rendered perfect by the suppletory oath of the party. But in many of the States of this country, where this kind of evidence is left to be framed by citizens of every occupation and every variety of language and character, and that, too, in their own way, any considerable degree of safety derived from the forms of book-keeping is the last thing to be expected. Yet books are rarely rejected for a defect of form, even in those States where they are not brought down to semi-proofs, and where, in the hands of inexperienced tribunals, it is almost of course that, being received, they should reach the effect of *prima facie* evidence. Being the original or first entries of the party in his own hand, these books are the least suspicious when kept in the form of daily entries in a single journal or day-book, of the debts and credits of the different persons with whom the party deals, in the order of dates, without blanks, chasms or marginal references. In France, if any of these requisites are wanting, the book is not competent evidence.[24] This is the most perfect form, and one which has never been questioned in the American courts, where book accounts are received in any way. But generally they do not require anything like these formalities in order to render books competent.

[20] Prince v. Smith, 4 Mass. 455; Eastman v. Moulton, 3 N. H. 156.

[21] Cogswell v. Dolliver, 2 Mass. 222; Curren v. Crawford, 4 S. & R. (Penn.) 3; Prince v. Smith, 4 Mass. 455; Swing v. Sparks, 7 N. J. L. 59.

[22] Code de Com. Liv. 1, tit. 2; des Livres de Commerce, art. 12; Poth. des Obl. nos. 719, 720.

[23] 1 Dom., p. 444, b. 3, tit. 6, § 3, art. 9.

[24] Code de Com. tit. 2; des Livres de Commerce, art. 8, 10.

At least, the entries should, in all cases, be strongly and clearly confirmed by common-law evidence, even where the oath of the party is required. Still they are competent, that is to say, they stand something above zero, though they may come short of the standard of credibility. One striking instance is in receiving entries kept ledgerwise; that is to say, where the account of each men dealing with the party is kept by itself, in a separate department of the book; thus affording every facility for undetected interpolation, either *ante* or *post litem notam*. Yet such books are receivable.[25] Books thus kept were received, though the entries in question were intermixed with various charges, notes, receipts and memoranda relating to the party's dealings with others, in whatever blank spaces he happened to find, without any regard to the order of dates or pages.[26]

But whether in a day-book or ledger form, the entries must appear to have been made daily, or they cannot be admitted.[27] If it appears at any stage or in any way, that charges arising at different dates were in fact made at the same time, the book is not evidence.[28] It must also be apparent that the entries were intended as book charges, in account with the identical party against whom they are offered in evidence.[29] If they are kept merely as a memorandum between the party and another, they are inadmissible.[30] Arbitrary marks fixed to the entries, not intended to charge the vendee, but merely to inform the porter and prevent a delivery of similar articles twice, cannot be used to aid in the evidence of delivery, especially if not always made by the same person making the residue of the entry, nor by the party nor his clerk.[31] So, a book kept by a forgeman to settle by with his customers, though it name the vendees, and sometimes the price, is not evidence against the latter.[32] It is not an insurmountable

[25] Swift's Ev. 81, 82; Rodman v. Hoop's Ex'rs, 1 Dall. (U. S.) 85; Faxon v. Hollis, 13 Mass. 427; Wilson v. Wilson, 6 N. J. L. 94; Cogswell v. Dolliver, 2 Mass. 217.

[26] Cogswell v. Dolliver, 2 Mass. 217.

[27] Eastman v. Moulton, 3 N. H. 156; Smith v. Lane, 12 S. & R. (Penn.) 80.

[28] McKnight v. Newell, 207 Penn. 562, 57 A. 39; Eastman v. Moulton, 3 N. H. 156.

[29] Rhoades v. Gaul, 4 Rawle (Penn.), 404; Rogers v. Old, 5 S. & R. (Penn.) 404; Smith v. Lane, 12 id. 80.

[30] Smith v. Lane, 12 S. & R. (Penn.) 80.

[31] Rhoades v. Gaul, *ante*.

[32] Rogers v. Old, 5 S. & R. (Penn.) 404.

objection to the competency of the book, that there be erasures and corrections. Its character is not thus destroyed as a book of original entries. The alteration is open to explanation, and the objection goes to the credit only.[33] But it is a serious objection against its credit; and if gross, suspicious, or unexplained, it will destroy the competency of the book. And so of any other fraudulent appearances.[34] Not only the day-book, but, if it be posted, the ledger must be produced, that it may be seen what credits there are. This was held where post-marks appeared on the day-book.[35] And it is the same in whatever way the fact of posting may be made to appear. The book being competent as a whole, almost any series of figures, abbreviations and words, which can be explained into a signification, will do for particular charges, and regard is always to be had to the party's degree of education, the nature of his employment, and the manner of his charges against others.[36] But the charges must be specific; that is to say, they must denote the particular work or service charged, as it arises daily, and the quantity, number, weight, or other distinct designation of the materials or articles sold or furnished, and attach the price or value to each item.[37] Accordingly, a bricklayer's charge of "190 days' work" was rejected; it should be placed in the book daily, being entered at the time as it occurs;[38] and a physician's charges "for medicine and attendance," and another thus: "thirteen dollars for medicine and attendance on one of the general's daughters in curing the whooping cough," were also rejected as too indefinite.[39] But this is a matter which must reside very much in the discretion of the judge, to be exercised according to the nature of the subject, and its susceptibility of being precisely charged. Where, within this rule, to be applied on the examination of witnesses and otherwise, the charge is sufficiently specific, it will be received; and such was the course in judging of a physician's bill and admitting it.[40] A receipt in the account book, purporting to be signed by the vendee, is not

[33] Sargeant v. Pettibone, 1 Aik. (Vt.) 355.

[34] Eastman v. Moulton, 3 N. H. 156.

[35] Prince v. Sweet, 2 Mass. 569; Eastman v. Moulton, 3 N. H. 156.

[36] Prince v. Smith, 4 Mass. 455.

[37] McKnight v. Newell, 207 Penn. 562, 57 A. 39, 41; Hughes v. Hampton, 2 Const. Rep. (S. C.) 745; Lance v. M'Kenzie, 2 Bail. (S. C.) 449; Lynch v. Petrie, 1 N. & M'Cord (S. C.), 130; Hagaman's Case, 4 N. J. L. 370.

[38] Lynch v. Petrie, *ante*.

[39] Hughes v. Hampton, 2 Const. Rep. (S. C.) 745.

[40] Schmidt v. Quin, 1 Rep. Const. (S. C.) 418.

receivable in proof as an original entry.[41] If the prices are not carried out, the books are imperfect, and if admissible at all, prove nothing as to the price, and the jury cannot guess at that; so the charge goes virtually for nothing.[42] We have already seen that, so far from being primary evidence, superior in degree to the mere oral testimony of disinterested witnesses, books are treated by the cases, according to their true character, as evidence secondary to common-law proof. It was in one case hastily held that the party's book must be produced like any other written evidence, as standing higher upon the scale, or that its absence must be accounted for, before sworn proof by witness should be received.[43] When the party is sworn, the book must be produced, for there it is the principal evidence;[44] and if it be lost, the party loses his oath.[45] In such a case, the contents of the book may be proved; but this must be by common-law evidence, though the party made the entry himself. If proved by another who made the entries, the book must be in court, or its absence accounted for; and so where the entries of a third person, deceased, are the subject of proof. In such case, the contents of the paper itself being in question, they must be proved like those of any other paper, by itself, if it can be had. Nor will the excuse that the party resides at a great and inconvenient distance, be received.[46] The rule as to showing the contents of documents by themselves only has been applied to account books by several cases.[47] But extracts from the books of foreign merchants, verified by the oaths of their clerks, were received, the court saying it would be unreasonable to require the books themselves.[48] It is well settled, that a party may, in his discretion, waive his books altogether, and rely upon his common-law proof, by witnesses or otherwise.[49]

[41] Sterritt v. Bull, 1 Binn. (Penn.) 234.

[42] Hagaman's Case, 6 N. J. L. 370.

[43] Kelly v. Holdship, 1 Browne (Penn.), 36.

[44] Nicholson v. Withers, 2 M'Cord (S. C.), 428.

[45] Prince v. Smith, 4 Mass. 455.

[46] Smith v. Peay, 2 Bail. (S. C.) 394.

[47] Keller v. Ord, 1 Dall. (U. S.) 310; Herring v. Levy, 4 Mart. (La. N. S.) 383; Smith v. Peay, 2 Bail. (S. C.) 394; Nicholson v. Withers, 2 M'Cord (S. C.), 428.

[48] Bell v. Keely, 2 Yeates (Penn.), 255. And see Lewis v. Bacon, 3 H. & M. (Va.) 89. See Elms v. Cheevis, 2 M'Cord (S. C.), 349.

[49] Levenworth v. Phelps, Kirby (Conn.), 71; Cambioso v. Maffett, 2 Wash. (U. S. C. C.) 101; Nicholson v. Withers, 2 M'Cord (S. C.), 428; Read v. Barlow, 1 Aik. (Vt.) 145, 147, 148, *per* SKINNER, C. J.; Palmer v. Green, 6 Conn. Rep. 14, 17; Bernham v. Adams, 5 Vt. 313; Whiting v. Corwin, 5 Vt. 451.

The party may take his account and proof from his adversary's book. But the non-production of his own book would many times, and especially if called for by his adversary, be a heavy circumstance against him.[50] Books are evidence, both of the items charged and the price or value carried out, subject to inquiry on other evidence.[51] Properly attested, they are *prima facie* evidence of the delivery of articles of merchandise[52]—indeed, both of sale and delivery; and in case of services, they are evidence of retainer to do the service, the doing of it, and the delivery of materials in the course of the service.[53] The book is to be taken together, with its charges and credits, especially where both are of the same date.[54] The party's books would be admissible on a collateral point in a cause, as if, in an action to recover money from the defendant, it should be material to determine the state of his accounts with another.[55] But it was afterwards held that, the third person being himself a witness, and his oath better evidence than his books, he should be produced. The case would not then come within the necessity on which this kind of proof is founded.[56] Entries made upon loose sheets of paper are not to be presumed to have been made as daily minutes of the parties' business transactions, and are not admissible in evidence. To render a book evidence, it must appear to have been regularly kept in such a manner as to afford a strong presumption of its accuracy; in other words, the charges in the handwriting of the party must appear in such a state that they may be presumed to have been his daily minutes of his transactions and business.[57] But if the book account appears to have been regularly kept, and the charges were made at or about the time the work was done, or materials found, it will not be rejected merely because it is proved by the party's suppletory oath that the entries were not invariably made on the same day the work was done, or articles furnished.[58] Neither the manner nor the form in which the book

[50] Palmer v. Green, 6 Conn. 14.

[51] Ducoign v. Schreppel, 1 Yeates (Penn.), 347.

[52] Foster v. Sinkler, 1 Bay (S. C.), 45.

[53] M'Bride v. Watts, 1 M'Cord (S. C.), 384.

[54] Harrington v. Hall, 2 Aik. (Vt.) 175.

[55] Mifflin v. Bingham, 1 Dall. (U. S.) 272.

[56] Juniata Bank of Pennsylvania v. Brown, 5 S. & R. (Penn.) 226.

[57] Richardson v. Emery, 2 N. H. 220.

[58] Morris v. Briggs, 3 Cush. (Mass.) 342.

is kept is material, so that it appears to have been fairly and honestly kept; thus, an account for work, entered on one leaf of a book with no intervening charges, is admissible, supported by the suppletory oath of the party, though the entry is in pencil.[59]

Where entries are produced which were made by persons acting for others, as agents, clerks, etc., some proof of agency is required, although, if the principal can be shown to have adopted or acted upon the entries, this would doubtless be sufficient. Thus, in a New York case,[60] in an action against one of the directors of a fair association for goods sold and delivered, an entry of an order in the plaintiff's order book, headed with the defendant's name, was held to be competent to show that the plaintiff acted on the order and charged the goods to the defendant. Without proof that the entry was made by some person having authority to make it, it is not admissible, although made many years before, in one case one hundred and sixty years before it was offered in evidence.[61] But where the books came from the proper custody, and contain strong internal evidence of their genuineness, slight proof of the authority or official character of the writer will be sufficient to let them go to the jury,[62] and, indeed, according to the cases cited, if the internal evidence of their genuineness is strong, this may be sufficient of itself. It is not, in the case of books of account kept by a deceased person, any objection to its admissibility that it contains entries *in* his interest, as well as against it. Thus, where the book contained entries of sums received by the deceased, upon one side, and upon the other entries of sums paid by him,[63] it was held to be admissible, even though the books shew a balance in his favor.[64] Entries made by a deceased clerk or agent, made in the usual course of business, as required in the line of his duty, upon proof of his handwriting in the book, and the book, upon inspection by the court, appearing to be fairly kept, are evidence of the facts stated therein.[65] But in order to give them

[59] Gibson v. Baily, 13 Met. (Mass.) 537.

[60] Wilcox v. Silver Plate Co., 72 N. Y. 17.

[61] Manby v. Curtis, 1 Price, 225; Davies v. Morgan, 1 C. & J. 590; Short v. Lee, 2 J. & W. 466; Stand v. Bradford, 2 Penn. 384; Jermain v. Dennison, 6 N. Y. 276; Richardson v. Kimball, 28 Me. 463.

[62] Brume v. Thompson, 6 Marsh. 36; Leter v. Warren, 5 Q. B. 773; Doe v. Thynne, 10 East, 206.

[63] Raure v. Brenton, 3 M. & R. 268.

[64] Williams v. Graves, 8 C. & P. 592; Moone v. Deandee, 2 Y. & C. 259 *n.*; Clark v. Wilmot, 1 Y. & C. 53.

[65] Dow v. Sawyer, 29 Me. 117.

that effect, the entries must appear to have been made in the usual course of business and of his employment,[66] the books to have been properly kept,[67] and the items charged therein must be proper subjects of book charge,[68] as a party can not be permitted to make evidence for himself by making entries upon his books of account as to matters which do not properly enter into or form a matter of account; and in this connection it may be said that nothing can be the subject of book account which cannot be recovered under the general counts in assumpsit.[69] Thus, in the case last cited, a factor agreed to return to his principal all property remaining unsold in his hands after the termination of his agency. But he failed to do so, and the property was charged to him in account. The court held that inasmuch as it was not shown that the property had been converted into money, a recovery could not be had against the defendant therefor in bood account. The proper remedy was trover.

An attorney's bill with an indorsement upon it, "March 4, 1815, delivered a copy to C. D.," which is proved to be in the handwriting of a deceased clerk, whose duty it was to deliver a copy of the bill, and proved to have existed at the date, has been held to be evidence to prove the delivery of the bill.[70] It has been held that a banker's ledger was receivable in evidence, in an action between the assignees in bankruptcy of a customer and a third party, to show that the customer at a certain time had *no funds* in the banker's hands, without calling the clerks who made the entries therein.[71] An entry of dishonor of a bill, made by a notary's clerk in the usual course, of business, is evidence of the fact of dishonor, after the clerk's decease.[72]

Upon the same principle, *contemporaneous* entries by a deceased shopman or servant in his master's books, in the ordinary course of business, stating the delivery of goods, are evidence for

[66] Lockey v. Schreiber, 17 Mo. 146.
[67] Kent v. Garvin, 1 Gray (Mass.), 148.
[68] Henshaw v. Davis, 5 Cush. (Mass.) 145; Earle v. Sawyer, 6 id. 142; Inslee v. Prall, 23 N. J. L. 457; Cale v. Dial, 8 Tex. 547.
[69] Kidder v. Lawless, 44 Vt. 303.
[70] Chapneys v. Peck, 1 Stark. 404.
[71] Furness v. Cope, 5 Bing. 114.
[72] Poole v. Dicus, 1 N. C. 649. In Marks v. Lahee, 3 N. C. 408, an entry by a deceased clerk of the plaintiff's attorney, in a day-book, stating a tender by him and refusal by the defendant, was held evidence of a replication to that effect; but there was a previous entry of a *receipt* by him of the money for the purposes of such tender.

his master of such delivery.[73] But an entry of a hiring at certain wages, in the deceased master's private book, with a memorandum of payment, is admissible evidence *inter alios*,[74] for it was neither his duty to make it, nor was he interested in making it in the proper sense of "interest." An entry purporting to be the substance of a lease made by the lord of a manor, contained in a book of his steward, 200 years old, is not evidence of the lease either as secondary evidence or as an entry made in the course of duty or business.[75]

In order to render such entries evidence, it must appear that the shopman is dead; that he is abroad, and not likely to return, is not sufficient.[76] The entry, too, must be by the person who actually did the act recorded by it. Thus, an entry of goods sold, made by a witness on the dictation of A., who had received information of the sale from B., a servant of the vendor, whose duty it was to report the sale to A., was rejected as evidence of the sale, though A. and B. were both dead.[77] Where a person employed to serve a notice on R. brought back the duplicate notice indorsed as so served, but stated orally that he had delivered it to W., it was held that, after the death of the person serving, it was not competent to give in evidence his oral statement of service on W.[78] An entry in a letter-book kept by a deceased clerk in the course of duty is secondary proof of the contents of the letter sent, and of the posting of it, if that was the course of business.[79]

By Stat. 7 Jac. 1, c. 12, s. 1, it was provided that the shop-book of a tradesman shall not be evidence in any action for wares delivered, or work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for his said debt, or shall have brought against him, or his executors, some action for the said debt within a year next after the delivery of the wares, or the work done. By sec. 2, the act was not to extend to traffic, or dealing between merchant and merchant, merchant and tradesman, or tradesman and tradesman, for anything within the com-

[73] Price v. Torrington, Ld., 1 Salk. 285; Patteshall v. Turford, 3 B. & Ad. 898.

[74] R. v. Worth, 4 Q. B. 132.

[75] Padwick v. Skinner, 3 Exch. 84. See, also, Doe v. Padwick v. Wittcomb, 6 Exch. 601.

[76] Cooper v. Marsden, 1 Esp. 1.

[77] Brain v. Preece, 11 M. & W. 773.

[78] Stapylton v. Clough, 2 E. & B. 933.

[79] Pritt v. Fairclough, 3 Camp. 305; Hagedorn v. Reid, ib. 379.

pass of their mutual trades and merchandise. This statute seems to recognize the previous admissibility of shop-books. But the act was never of much practical importance, and the admissibility of such books at common law, in favor of the tradesman, must generally depend on the principles already referred to.[80]

Although an entry made in the course of office, reporting facts necessary to the performance of a duty, may be admissible, yet the statement in it of other extraneous circumstances, however naturally they may find a place in the narrative, is no proof of these circumstances. Thus, a return by a sheriff's officer of an arrest at a specified place is not evidence, *inter alios*, of the *place* of arrest.[81] This case illustrates a distinction between declarations against interest and declarations made in the course of office or business. The former declarations are evidence of all the facts stated; the latter, only of the facts which it was the business of the officer or writer to state.[82] So, entries against interest are evidence, whensoever made. The latter entries must generally be contemporaneous with the act done.[83]

[80] Symonds v. Gas Light Co., 11 Beav. 283.

[81] Chambers v. Bernasconi, 1 C., M. & R. 347.

[82] Percival v. Nanson, 7 Exch. 1.

[83] Smith v. Blakey, L. R., 2 Q. B. 326. In Edie v. Kingsford, 14 C. B. 759; 23 L. J., C. P. 123, a distinction is incidentally made *per cur.* between declarations "in the course of *business*," and declarations "in the course of *duty*;" but the cases cited recognize no such distinction.

CHAPTER XIV.

Res Gestae.

SECTION 133. What is general rule?
134. Personal injuries and their cause.
135. Statements made by applicant for life insurance.
136. Statements made before the principal fact. Intent.
137. Collateral matters connected with principal fact.
138. Declarations as to title and possession of lands.
139. Spontaneity of the acts and declarations essential; what is.
140. Acts and statements after the principal fact.
141. Declarations of conspirators, when evidence against co-conspirators.
142. Statements of conspirators, when not part of the *res gestae*.
143. Writings in possession of conspirators before or after apprehensions.

Sec. 133. What is General Rule.

It is a well-settled rule of evidence that the declarations and acts of the principal parties to an act, as well as the circumstances surrounding them and accompanying the transaction at the time of the principal fact, may be given in evidence in a controversy between the parties relative thereto as a part of the *res gestae*, which are calculated to show the nature of the act, and are in harmony with it. *But in order to be admissible they must be immediately connected with the material inquiry involved in the issue, and must have occurred at the time of the transaction, or if not precisely concurrent, so closely connected therewith that they may be said to spring from it, and thus tend to explain it. They must be so closely connected with the principal act in point of time as to be spontaneous and voluntary, and to preclude all possible idea of deliberate design.* Indeed, it has been said that the declarations or acts must be the natural or inseparable concomitants of the principal fact in controversy, so that they may be presumed to have been induced by the same motive that led to the act itself, and so closely allied thereto in point of time as obviously to form a part of the transaction, and must be calculated to unfold its nature and quality. If there is anything which raises a suspicion that they were intended to deceive, and

were made or done in bad faith, the court not only *may*, but should, exclude them.[1]

In order to make declarations a part of the *res gestae they must, in all cases, be contemporaneous with the main fact; they must have been made at the time of the act done, to which they relate, and must be well calculated to unfold the nature and quality of the facts they were intended to explain, and to so harmonize them*

[1] Riggs v. State, 6 Cold. (Tenn.) 517; Elkins v. Hamilton, 20 Vt. 627; Carter v. Buchanan, 3 Ga. 513; Fifield v. Richardson, 34 Vt. 410; Atherton v. Tilton, 44 N. H. 452; Meek v. Perry, 36 Miss. 190; Springer v. Droach, 32 Ind. 486; Crowther v. Gibson, 19 Mo. 365; Lund v. Tyngsborough, 9 Cush. (Mass.) 36; Koch v. Howell, 6 W. & S. (Penn.) 350; Clayton v. Tucker, 20 Ga. 452; Curtis v. Avon, &c., R. R. Co., 49 Barb. (N. Y.) 148; Stewart v. Hanson, 35 Me. 506; Clark v. Rush, 19 Cal. 393; Russell v. Frisbee, 19 Conn. 205. And this is applicable to actions civil or criminal. Hamilton v. State, 36 Ind. 280. If a declaration is in itself a *fact* in the transaction, or is made by a person while doing an act, and serves to explain it, it is a part of the *res gestae;* but if it is merely a recital of a past transaction, it is not, although it may have some relation to an act which a person may be doing when he makes such declaration. Haynes v. Rutter, 24 Pick. (Mass.) 242; Bank v. Kennedy, 17 Wall. (U. S.) 19; People v. Brotherton, 47 Cal. 388; Sill v. Reese, id. 294; Landell v. Hotchkiss, 4 N. Y. Sup. Ct. 685; Burlew v. Hubbell, 1 id. 235; Parker v. R. R. Co., 109 Mass. 449; Jordant v. Osgood, id. 457. Declarations or circumstances accompanying an act in controversy, may be proved in a proper case, as connected with and explanatory of the principal act, although they might not be admissible as independent evidence. Hoyer v. Stevens, 1 Woodb. & M. (U. S. C. C.) 290; Jones v. Brownfield, 2 Penn. St. 55; United States v. Omeara, 1 Cranch (U. S. C. C.), 165; Webb v. Kelly, 1 Ala. 349; Yarborough v. Moss, 9 Ala. 382; Hoper v. Edwards, 20 Ala. 528; Sanford v. Howard, 29 Ala. 684; Bragg v. Massie, 38 Ala. 89; Cornelius v. State, 12 Ark. 782; Robinson v. Lane, 19 Ga. 387; Rigg v. Cook, 9 Ill. 336; Strange v. Donohue, 4 Ind. 327; Austin v. Swank, 9 Ind. 109; Franklin v. Woodland, 14 La. Ann. 188; Corinth v. Lincoln, 34 Me. 310; Stewart v. Hanson, 35 Me. 506; Duvall v. Medtart, 4 H. & J. (Md.) 14; Curtis v. Moore, 20 Md. 93; Elliott v. Stoddard, 98 Mass. 145; Plumer v. French, 22 N. H. 450; Johnson v. Elliott, 26 N. H. 67; Tucker v. Peaslee, 36 N. H. 167; State v. Huntley, 3 Ired. (N. C.) L. 418; Slitt v. Wilson, Wright (Ohio), 505; Wetmore v. Mell, 1 Ohio St. 26; Posterns v. Posterns, 3 W. & S. (Penn.) 127; Hood v. Hood, 2 Grant (Penn.), Cas. 229; Rees v. Livingston, 41 Penn. St. 113; Turpin v. Brannon, 3 McCord (S. C.), 261; Martin v. Simpson, 4 id. 262; Pains v. Jenkins, 2 Rich. (S. C.) 106; Blair v. Coffman, Overt. (Tenn.) 176; Kerby v. State, 7 Yerg. (Tenn.) 259; Evans v. Jones, 4 id. 461; Elkins v. Hamilton, 20 Vt. 627; Gillet v. Phelps, 12 Wis. 392. But to make the declarations of a party evidence in his favor, as a part of the *res gestae*, they must be connected with the material fact or inquiry involved in the issue. Tomkins v. Reynolds, 17 Ala. 109. Carter v. Buchanan, 3 Ga. 573; McKee v. People, 36 N. Y. 113; Mitchum v. State, 11 Ga. 615; Cole v. Cheshire, 1 Gray (Mass.), 441; Mason v. Palmer, 8 Allen (Mass.), 337; People v. Vernon, 35 Cal. 9; Hundy v. Johnson, 5 Md. 450; Wright v. Boston, 126 Mass. 161; Sessions v. Little, 9 N. H. 271; State v. Shelledy, 8 Iowa, 477; Steam Navigation Co. v. Dandridge, 8 Gray (Md.), 248; Cramer v. Shrimer, 18 Md. 140; Hall v. James, 3 McCord (S. C.), 222. In order to be ad-

as obviously to form one transaction.[2] The entire value of this class of evidence depends upon its spontaneity, and is predicated upon the idea that *being spontaneous,* springing from the act itself, and forming a part of it in point of time, before any idea of deliberate design or purpose to make evidence for each other has entered the minds of the parties, it tends to explain, unfold and throw light upon the transaction.

missible, they must be so connected with some material act as to explain or qualify it, or show the intent with which the act was done. Thus, in an action brought by A. against B. as the owner of a certain brig in which A. had shipped merchandise, for the non-delivery of such merchandise, it appeared that B. was the general owner of the brig, and that C., on the 17th of September, and before, was the authorized master; but that B., on the 18th of September, took from on board of the brig her papers and put them into the custody of D., which were never returned to the brig; and that said merchandise was shipped after this transaction. B. claimed that he, at this time, revoked the authority of C. as master; and that C. then surreptitiously obtained other papers, and ran off with the vessel, sailing her without any authority from B. To establish this claim, B. introduced, with other evidence, the testimony of D., that B., when he delivered the papers to him, said that "C.'s wife intended to go in the brig, and if so, he was fearful there would be difficulty, and he could not let the vessel go: he did not want the vessel to go to sea, if C.'s wife was going in her." It was held that these declarations, so made, were admissible for the purpose for which they were offered. Russell v. Frisbie, 19 Conn. 205. But where there is no *immediate* connection between the act and the declaration, it cannot be regarded as a part of the *res gestae.* Thus, where a party, having taken up and removed an ancient fence, put down a stone in one of the post-holes, where it remained, and the next day he declared that he put it there as a bound, it was held that this declaration was not so connected with the *act done* as to constitute a part of it, and was, therefore, inadmissible evidence for such party. Noyes v. Ward, 19 Conn. 250.

[2]HOSMER, J., in Eves v. Tuttle, 3 Conn. 250; Mitchum v. State, 11 Ga. 615. *Res gestae,* says the court in Carter v. Buchanan, 3 Ga. 513, *are the circumstances, facts and declarations which grew out of the main fact, are contemporaneous with it, and serve to illustrate its character.* Where the question was whether certain property taken under execution belonged to the judgment debtor, it was held that statements by the debtor to a clerk employed by him, as to whom he was employed for, were admissible as part of the *res gestae.* Statements by the party in possession of certain property, that the business was his, and was only run in his father's name for protection, were held inadmissible, as being something more than merely explanatory of the possession. Sweet v. Wright, 57 Iowa, 510. The declaration of a person in possession of land, that he took possession as agent of another, is admissible in evidence as a part of the *res gestae* in action against his alleged principal. Kirkland v. Trott, 66 Ala. 417. Upon the trial of an issue as to whether certain notes were paid, the testimony of the party claiming to have paid them, that, in the absence of the other party, he threw them into a stove, calling the attention of bystanders to the fact that they were the notes in controversy, is inadmissible, as is similar testimony on the part of the bystanders. Cumins v. Leighton, 9 Ill. App. 186. On trial of A. for rape upon B., it was held that the circumstances of an assault by A. upon C., B.'s father-in-law, when C. came to her rescue during her struggle with A., were part of the

Sec. 134. Personal Injuries and their Cause.

It is for this reason, and upon this ground, that the declarations of a party who has been injured and is suffering from the effects of the injury, made during such period of suffering, are admissible to show the extent of such suffering.[1] Indeed, whenever the bodily or mental feelings of a person are material, the usual expression of such feelings *made at the time* in question is, as to such facts, original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory and generally the only evidence of its existence, leaving it for the jury to say whether they were real or feigned.[2] Where

res gestae, and B. might testify that C. was dead at the time of the trial. Thompson v. State, 11 Tex. App. 51. In an action against a constable for selling certain hogs belonging to the plaintiff, as the property of the person in possession, the declaration of such person that the hogs belonged to the plaintiff, made before the levy, was held admissible, as part of the *res gestae*, showing the character of the possession, and as against the defendant claiming under her. Sharp v. Miller, 3 Sneed (Tenn.), 42. In an action upon an agreement by the defendants, that P. should account to the plaintiff for certain goods sold by the later to P., the testimony of the plaintiff in reference to the state of accounts between him and P. was held admissible, although it necessarily introduced conversations between them, as such conversations were a part of the *res gestae*. Fox v. Parker, 44 Barb. (N. Y.) 541. An action was brought upon a bond given to release a barge which had been attached to enforce a lien upon it for lumber furnished to the builder by the plaintiff. It was held that declarations of the builder's agent who purchased the lumber, made to the plaintiff while transacting the business, as to the person for whom he purchased it, and as to the amount thereof used in building the barge, were admissible as part of the *res gestae*. Hoppy v. Mosher, 47 Barb. (N. Y.) 501.

[1] A witness who observed the symptoms of mental pain and anguish can testify to that fact. (Anguish from slander,) Kidder v. Bacon, 74 Vt. 263, 52 A. 322. Complaint by a plaintiff of present pain is admissible in Alabama. Kan. City M. & B. R. Co. v. Butler (Ala., 1905), 38 So. 1024. The expressions of present existing pain or its location are exceptions to the general rule which excludes hearsay evidence. Gosa v. Southern Railway, 67 S. C. 347, 45 S. E. 810. Exclamations of pain and actions indicating pain are part of the *res gestae*. Oliver v. Columbia N. & L. R. Co., 65 S. C. 1, 43 S. E. 307. Expressions or remarks indicating present pain not in reply to questions and not narrative in nature may be admissible as part of the *res gestae* although made three days after the accident. Bredlau v. York, 115 Wis. 554, 92 N. W. 261. Complaints of pain made to one not an attending physician a long time after the accident are admissible in Indiana. Indiana Ry. Co. v. Maurer, 160 Ind. 25, 66 N. E. R. 156. Complaints of pain made to a servant after the injury are not competent in Illinois as such complaints are admissible only when made at the time of the injury or when made to a physician during treatment. Lake St. Elevated R. Co. v. Shaw, 203 Ill. 39, 67 N. E. R. 374. Illinois, &c., R. R. Co. v. Sutton, 42 Ill. 438; Gray v. McLaughlin, 26 Iowa, 279; Jex v. Board of Education, 1 Hun (N. Y.), 157; Burnham v. State, 38 Tex. 662.

[2] Phillips v. Nully, 29 Ala. 628; Hyatt v. Abrams, 16 Mich. 180; Howe v. Plainfield, 41 N. H. 135; Perkins v. Concord, 44 N. H. 223;

the plaintiff claimed serious mental injury arising out of an accident evidence of his statements at any time during the alleged mental condition is admissible as a verbal act.[3] Therefore exclamations of pain,[4] and complaints of suffering, either in body or mind, resulting either from sickness or an injury to the person,[5]

Kent v. Lincoln, 32 Vt. 591; People v. Williams, 3 Parker Cr. (N. Y.) 84; Stone v. Watson, 1 Ala. Ld. Cas. 236; Caldwell v. Murphy, 11 N. Y. 416; Fry v. Bennett, 3 Bosw. (N. Y.) 200; Baker v. Griffith, 10 id. 140; Lusk v. McDaniel, 13 Ired. (N. C.) L. 485.

[3] Cashier v. New York, N. H. & H. R. Co., 185 Mass. 543, 70 N. E. R. 930.

[4] Hyatt v. Adams, 16 Mich. 180. In this case exclamations of pain uttered by a patient were held to be original evidence of suffering and admissible to show malpractice on the part of a physician, but not for the purpose of aggravating the damages.

[5] Howe v. Plainfield, *ante*. Such expressions are regarded as natural evidence, and are to be submitted to the jury, with all the circumstances attendant upon their expression, to determine whether they are real or feigned, and to give them such weight as they may deem them entitled to in view of all the attendant circumstances. Gray v. McLaughlin, 26 Iowa, 279; Phillips v. Kelley, 29 Ala. 628; Johnson v. State, 17 id. 618; Looper v. Bell, 1 Head. (Tenn.) 373. And if such statements are made, after the action for damages is commenced, to a physician, to enable him to form a medical opinion as to the patient's condition, such statements are competent as a part of the *res gestae;* but the time when they were made may detract from their weight. Barber v. Merriam, 11 Allen (Mass.), 322; Towle v. Blake, 48 N. H. 92; Taylor v. Gr. Trunk R. R. Co., id. 304. So it has been held, in an action against a physician for malpractice, that exclamations of pain uttered by a patient may be given in evidence as a part of the *res gestae,* for the purpose of establishing the claim, but not in aggravation of the damages. Hyatt v. Adams, 16 Mich. 180. And indeed it may be stated generally that the statements of a sick or injured person as to the nature, symptoms, or extent of the disease or injury, are always admissible to show his actual condition at the *time* when they are made. They must not relate to the *past* condition of the person, but to his real condition at the time when the declarations are made. Hunt v. People, 3 Park. Cr. (N. Y.) 569; People v. Williams, id. 84; Perkins v. Concord R. R. Co., 44 N. H. 223; Stone v. Watson, 1 Ala. Sel. Cas. 236; Baker v. Griffin, 10 Bosw. (N. Y. Superior Ct.) 140; Caldwell v. Murphy, 11 N. Y. 416; Denton v. State, 1 Swan (Tenn.), 297; Kent v. Lincoln, 32 Vt. 591; Bacon v. Charlton, 7 Cush. (Mass.) 581; Lush v. McDaniel, 13 Ired. (N. C.) 485; Earl v. Tupper, 45 Vt. 275; Spatz v. Lyons, 55 Barb. (N. Y.) 476; Insurance Company v. Mosley, 8 Wall. (U. S.) 387. But it is held that the declarations of a person under such circumstances as to the *manner* in which it occurred, however contemporaneous with the act itself, are not admissible. State v. Davidson, 30 Vt. 377. But it seems that the *cause* of the injury may be proved by declarations of a party injured, so nearly allied, as to the time of making them, with the injury itself, that they may fairly be regarded as a part of the *res gestae.* Stiles v. Danville, 42 id. 282. In Quaife v. Chicago and Northwestern Railway Co., 48 Wis. 513, it was held that in an action of damages for personal injuries by negligence, the plaintiff having at the defendant's request submitted to a physical examination by surgeons, testimony that, judging from the examination, including what she said at the time, and her indications of suffering, the injury complained of existed, was admissible, although the witness swore he could discover no external evidence of it. This is based on Barber v. Merriam,

are treated as original evidence to prove the fact and extent of

11 Allen (Mass.), 322, where BIGELOW, C. J., says: "The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms, and the causes which have led to the injury or disease under which he appears to be suffering. This opinion is clearly competent, as coming from an expert. But it is obvious that it would be unreasonable, if not absurd, to receive the opinion in evidence, and at the same time to shut out the reasons and grounds on which it was founded. Such a course of practice would take from the consideration of court and jury the means of determining whether the judgment was sound, and his opinion well founded and satisfactory. . . . The party producing the witness, and who relies on his opinion, should be allowed the privilege of showing that his testimony, as an expert, is the result of due inquiry and investigation into the condition and symptoms of the patient, past and present. . . . The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded." And at p. 326 he says: "It is suggested in behalf of the defendant, that the statements in the present case were made by the plaintiff after the commencement of the action. But we do not think that for this reason only they ought to have been rejected. It was a circumstance which may have detracted from the weight of the evidence of the opinion of the physician, so far as it was founded on these statements. But as the statements were made to a medical man, for the purpose of receiving advice, they were competent and admissible." The same doctrine is held in Matteson v. N. Y. Cent. R. R. Co., 35 N. Y. 487. The injury occurred on the 7th of July, and consisted in concussion of the spine. Declarations made by the injured person in the following October, after suit brought, to physicians while they were examining her to ascertain her condition, were held admissible in her behalf. The court said: "Her complaints and representation of pain and suffering, together with appearance and conduct, necessarily formed the basis of their judgment." "This is the case notwithstanding the examinations referred to were made by the physicians after the suit was commenced, and with a view as to their testifying therein as to the result of their examinations. It does not appear that the patient knew that such was their object, and if she did know it, the jury were to judge whether her representations were false or her testimony conclusive." So, in Brown v. N. Y. Cent. R. R. Co., 32 id. 597, testimony that the injured party complained "all the time since the injury," was held admissible. To the same effect Caldwell v. Murphy, 11 id. 416, where the complaints were made during ten or eleven days after the injury, and in Werely v. Persons, 28 id. 344, where they were made during two or three weeks after the injury. In Aveson v. Kincaid, 6 East, 188, it was held that the complaints and statements of the injured party at the very time of the occurrence, not only as to bodily suffering, but as to the circumstances of the occurrence, are admissible as *res gestae*. Second, That the statements of the injured party subsequently and not substantially at the time of the occurrence, as to the circumstances of the occurrence, are not admissible, whether made to a physician or to a non-expert. Third, Complaints and statements of the injured party as to his present physical condition, although subsequently to the occurrence and indeed after suit is brought for the injuries, are admissible, whether made to a physician or to one who is not an expert. Lush v. McDaniel, 13 Ired. (N. C.) 485; Chapin v. Marlborough, 9 Gray (Mass.), 244; Goodwin v. Harrison, 1 Port. (Ala.) 80; Kennard v. Burton, 25 Me. 39; Denton v. State, 1 Swan (Tenn.), 279.

suffering, but not to prove the *cause thereof*,[6] even though made to a physician,[7] unless made at such a time as to entitle them to be regarded as a part of the *res gestae*.[8] Thus, a statement by a person injured as to the cause of the injury made within two minutes after his legs had been cut off, while he was lying on the ground suffering, is admissible as part of the *res gestae*.[9] A statement made by a prosecutrix in a complaint for rape, a very few minutes after the crime was committed, or even a half hour

[6] Statements of a plaintiff made several minutes after an accident on a street car and after the car had left the scene and after the plaintiff had been carried from the place of the accident across the street to the sidewalk and the witnesses to whom the statements were made had traveled several blocks after hearing of the accident, to the scene, before said statements were made are not *res gestae*. Hot Springs St. Railway Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245. A statement made by the plaintiff to her mother on coming home after a fall, that she had hurt herself by stepping in a hole in the sidewalk, is inadmissible as are also later statements to the same effect to her mother and to a physician attending her. Fallon v. Rapid City, 17 S. D. 570, 97 N. W. 1009.

[7] Statements by a party injured as to the cause of his injury made some hours after the injury are not part of the *res gestae* and not admissible even though made to his physician. Globe Accident Insurance Co. v. Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486. A statement by a plaintiff one-half hour after the accident to his physician as to his injuries are admissible as part of the *res gestae* on the theory that the incentive for a fair statement to his physician so that he may properly treat the injuries of the patient is so great that the presumption is that he will not hazard an untruth to better his financial condition. But a statement made at that time as to the place of his injury is not subject to these considerations and is not admissible as part of the *res gestae* as it is a mere narrative of the events attending the physical injury. It is not necessary for the physician to know whether the accident occurred on one bridge or another and its admissibility stops with the necessity of such knowledge. Shade's Adm. v. Covington-Cinn. E. R. & T. & B. Co., (Ky. 1905), 84 S. W. 733. Approved in Louisville and Nashville R. R. Co. v. Smith, (Ky., 1905), 84 S. W. 755.

[8] Gray v. McLaughlin, 26 Iowa, 279; Matterson v. N. Y., etc., R. R. Co., 35 N. Y. 487; Kennard v. Burton, 25 Me. 39. Such evidence may be said to be *natural* evidence, as distinguished from personal evidence. Phillips v. Kelly, 29 Ala. 628. In Ohio, etc., R. R. Co. v. Hammersley, 28 Ind. 371, upon the trial of an action brought by a father to recover for the death of his minor son, caused by the negligence of a railroad company, it was sought to introduce, on behalf of the defendants, the declarations of the son, made the day following the injury, as to the cause of the accident. It was held that the evidence was properly excluded. The son could not admit away the cause of action; nor could he, without regard to the question of minority, have released the company from any liability incurred by it to the father. If he had survived the accident, he would have been a competent witness to prove the facts; but his previous admissions could only have been given in evidence to impeach his testimony. In an action brought by the son, the statement would have been properly introduced as an admission against himself.

[9] Murray v. Boston & Maine R. R., 72 N. H. 32, 54 A. 289, 291. See also International and Great Northern Ry. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902.

thereafter, while the prosecutrix was lying on a bench, hurt and bleeding, is admissible as part of the *res gestae* apart from the rule as to complaint in prosecutions for rape.[10] Where the mother and sister of the deceased came into the room immediately after he was shot and asked him who did it, his declarations at that time made in the presence also of his wife are admissible and part of the *res gestae* and what was said by the mother, wife and deceased are in the nature of exclamations explanatory of what had occurred.[11] A declaration made by a person injured to a witness who saw the accident and who rushed immediately to his help, when he then and there declared to them how he was hurt, is part of the *res gestae*.[12] Where a plaintiff received a fracture of the skull by falling, his statement, made immediately upon entering the house after the fall, as to the manner and cause of the fall, is admissible as part of the *res gestae*,[13] but a statement by a person since deceased as to a fall, made at least fifteen minutes after the fall and after he had walked several hundred feet, was held not admissible as part of the *res gestae*.[14] Practically all of the courts in which the question has arisen hold that statements of present pain and suffering, made before suit brought, by a patient to his physician, who had been called in solely for the purpose of examining, advising, and treating him, may be given in evidence by such physician, when called as an expert witness, as part of the facts upon which he bases his opinion as to the nature and extent of the patient's injuries or disease. As to the admissibility of statements of past pains or sensations, made by a patient to his physician, there is a decided conflict in the rulings of the courts, some holding that such statements are inadmissible, while others hold that it is admissible for the physician to testify to them when giving his opinion as an expert to the jury. The

[10] Castillo v. State, 31 Texas Crim. Rep. 145, 19 S. W. 892, 37 Am. St. Rep. 794; *Contra*, People v. Graham, 21 Cal. 261.

[11] Sutcliffe v. Iowa Travelling Men's Association, 119 Iowa, 220, 93 N. W. 90; State v. Arnold, 47 S. C. 9, 24 S. E. 926, 58 Am. State Rep. 867.

[12] Williams v. Southern Railway, 68 S. C. 89, 369, 47 S. E. 706.

[13] Rothrock v. City of Cedar Rapids (Iowa, 1905), 103 N. W. 475.

[14] Keefer v. Pacific Mut. Life Ins. Co. of California, 203 Penn. 129-131, 51 A. 366. "There is no sound reason for making any exception in cases of this character to the rule which excludes hearsay testimony." The one exception is found in involuntary exclamations of pain, convulsive movements of the body, flinching and screaming when a particular portion of the body is pressed or touched or other physical manifestations of bodily suffering, is the rule in Georgia.

weight of authority, however, seems to be that statements or narratives of past pains and symptoms made by a patient to his physician are inadmissible. Some of the courts, impressed with the danger of opening the door of evidence for the admission of hearsay testimony, particularly in cases in which the hearsay statement may be of self-serving nature, hold that statements of the above character, even when made by a patient to his physician, are not admissible if made after suit brought by the patient for his injuries. Others hold that they are not admissible if made to a physician or surgeon called for the sole purpose of qualifying himself to testify, as an expert, in behalf of the plaintiff in an action for damages. A few recognize no such distinction, but hold that the fact that the statements were made under such circumstances does not render them inadmissible, but is merely a circumstance to be taken into consideration by the jury in weighing the effect of such statements and the opinion of the expert based in part thereon.[15]

As a matter of course, such representations made to a physician in attendance upon him are entitled to greater weight than those made to others, because he is better able to judge of their truth.[16]

[15] Atlanta K. & N. Ry. Co. v. Gardner, 122 Ga. 82, 49 S. E. 818, 824. In Illinois statements of a plaintiff to a physician as to his injury are admissible only when made during actual treatment and in immediate connection therewith, even though after suit brought. Chicago City Ry. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28. In Wisconsin statements as to subjective symptoms made to a physician as a basis for his testimony or made both for the purpose of treatment and as a basis for testimony after action brought, are inadmissible. Kath v. Wisconsin Cent. Ry. Co., 121 Wis. 503, 99 N. W. 217. In Michigan declarations of present pain and suffering are admissible so long as they do not amount to narrations of past conditions unless given after the injured party decided to bring suit to a physician called, not for the purpose of treatment, but for the purpose of testifying. McCormick v. Detroit G. H. & M. R. Co., (Mich., 1905), 104 N. W. 390. In Massachusetts although a statement by a party of his bodily and nervous symptoms made long after the accident to which he attributes them and for purposes connected with the preparation for trial of a suit in which his condition of health is material, and not made to a physician for the purpose of obtaining advice or treatment are not admissible in his favor, still an expert after examining him may give such statements in his behalf as the reason for his opinion. Cronin v. Fitchburg, etc., Ry. Co., 181 Mass. 202, 63 N. E. 335, 92 Am. State Rep. 408. But in Illinois when a physician examines a party injured some three years after an accident, not for treatment but simply as preliminary to testifying in court about his injuries, the physician's opinion as to his hearing based on what the patient told him is incompetent. Chicago & E. I. R. Co. v. Donworth, 203 Ill. 192, 67 N. E. R. 797.

[16] Northern Pacific R. v. Urlin, 158 U. S. 271, 275, 15 S. Ct. 840; Sellman v. Wheeler, 95 Md. 751, 54 A.

Sec. 135. Statements made by Applicant for Life Insurance.

It is competent for a party insured by a policy of life insurance to show in rebuttal to the claim of the insurer that his statements in his application were false, that he told the agent for the insurer of the facts in the case and followed his advice in answering the questions.[17]

Sec. 136. Statements made before the Principal Fact. Intent.

As a general rule nothing said or done *before* the principal act occurred *or which was within the contemplation of the parties,* can be regarded as a part of the *res gestae,* although only separated by the briefest possible span of time. Thus, in an action against a railway company for injuries to the person, declarations made by the conductor of the train, to a passenger, *a moment before the accident,* as to the bad condition of the road and the number of times his train had run off the track upon consecutive trips next preceding the one in question, was held not admissible in proof of negligence, either as *res gestae* or an admission by the company.[1] The admission of such declarations made *before* the act, would, except in exceptional cases, be entirely contrary to the funda-

512; Gray v. Young, 4 McCord (S.C.) 31; Aveson v. Kinnaird, 6 East, 188; Gilchrist v. Bale, 8 Watts (Penn.) 355.

[17] Marston v. Kennebec Mut. Life Insurance Co., 89 Maine 266, 36 A. 389, 56 Am. St. Rep. 412. See also Miller v. Phoenix Insurance Co., 107 N. Y. 292, Continental Insurance Co. v. Chamberlain, 132 U. S. 304, Susquehanna Insurance Co. v. Cusick, 109 Penn. State 157. North American Insurance Co. v. Throop, 22 Mich. 146, 7 Am. St. Rep. 638. Patten v. Merchants Insurance Co., 40 N. H. 375, 380; *Contra,* Batchelder v. Queen Insurance Co., 135 Mass. 449. Franklin Insurance Co. v. Martin, 40 N. J. Law 568, 29 Am. Rep. 271.

The doctrine of *res gestae* in England has been carried so far as to hold that in an action by a husband upon a policy of insurance on the life of his wife, where the question related to the state of her health at the time when the policy was effected, a witness for the defendants was allowed to state the result of a conversation she had had with the deceased, shortly after the surgeon who was consulted in effecting the insurance had given a certificate of her health, in which conversation the deceased had expressed an apprehension that she should only live a few days, and had added that she had not been well from a time preceding her being examined by the surgeon. The court held that the conversation was admissible, notwithstanding the general rule which excludes the declaration of a wife as against her husband; and the more especially so, as the surgeon had been first called by the plaintiff, and had admitted that he had formed his opinion respecting her health principally from the satisfactory answers she had given to his inquiries. Averson v. Lord Kinnaird, 6 East 188.

[1] Mobile, etc., R. R. Co. v. Ashraft, 48 Ala. 15. See also Greenfield v. People, 85 N. Y. 75; 39 Am. Rep. 636.

mental principle upon which the doctrine relating to *res gestae* is based, *that it explains and unfolds the principal acts by the undesigned acts or declarations of the parties, or others who participated in the act either as actual participants or as witnesses thereof, because* it would hardly be said that what a person said or did *before the principal act was contemplated,*[2] could afford any light either upon the motives of the parties, or what they did. *But when the principal act is once in contemplation by the parties, their acts and sayings relating thereto, and which tend to explain or unfold the principal act, from that time until the act is complete,* are held to come under this head.[3]

[2] But see State v. Thomas, 30 La. An. 600, where declarations of the accused, made *before*. the alleged larceny, that the property was his own, were held admissible on his behalf as part of the *res gestae*. See also Davis v. Zimmerman, 40 Mich. 24, where it was held that such declarations relating to the title of property were, in some cases, admissible as a part of the *res gestae*, because they tend to explain the acts of the party relating thereto. See also Haynes v. Lippey, 40 Mich. 602. In a Georgia case, where a quarrel commenced at one groggery and terminated in a homicide at another, during the same night, in the same village, it was held that all that transpired at both groggeries was admissible as *res gestae*, though some interval of time may have intervened between the beginning and end of the encounter. Stiles v. State, 57 Ga. 783.

[3] Where the negotiation for the purchase of a boiler was adjourned from the morning to the evening, resulting in a sale and warranty, evidence was held to be admissible, of statements made by the seller in the morning interview, pertinent to a warranty of its quality and condition. Cunningham v. Parks, 97 Mass. 172.

In a claim case, the claimant set up a deed from the defendant in execution, which was claimed to be fraudulent. A memorandum containing declarations of said defendant, made in the course of giving instructions for preparing the deed the day before its execution, to a scrivener, who was also agent of the claimant, who was absent, it was held admissible in evidence as part of the *res gestae*. Pearson v. Forsyth, 61 Ga. 537.

In Robinson v. State, 57 Md. 14 (MILLER and IRVING, JJ., dissenting), upon a trial for abducting several young children of A., it appeared that the accused went to A.'s house during his absence, and drove away a wagon in which was A.'s wife, children and furniture. The evidence for the prosecution tended to show that the wife and children went with the accused through fear of violence induced by his threats. For the defense, the testimony of the occupant of a house at which the party stopped over night was offered to show that the wife said that she left home voluntarily, taking the children and furniture with her, and herself getting the defendant to drive the wagon, and that she was not going to live longer with her husband. It was held that this evidence was admissible.

In suit for damages for assault and battery, evidence of what the parties said during the altercation which was followed by the assault is admissible. All the words and acts of the parties, and not detached words and sentences, should go to the jury. So, also, declarations of a bystander made during the progress of such altercation, if necessary to a full understanding of the character of the act complained of. Baker v. Guisin, 76 Ind. 316.

In an action for the conversion of personal property, the defense was, that the plaintiff's claim was based

On the issue of the manner of death of a party a letter written by him immediately before his death, indicating his intention to commit suicide, is admissible as part of the *res gestae.*[4] Where the question in issue is whether the plaintiff was hired by the defendant for an indefinite period or for one year, a letter written by the defendant the day before the hiring and received by the plaintiff the day after the hiring, in which the defendant requests an appointment for the purpose of securing his services "for the coming year," is admissible as part of the *res gestae.* It was in effect a declaration made contemporaneously with and explanatory of the act of hiring.[5] Thus, in a Vermont case,[6] where the respondent was indicted for abortion committed upon one Olive Ash, from the effects of which she died, it appeared from the testimony of her sister, who left her home and went to the respondent's house with her, that she supposed her sister to be pregnant and that they, her sister, "left Sutton to get an abortion procured, *as was understood between us at the time we left.*" It appeared from her testimony that at the time when they started out upon this mission, they had not decided *where* to go, and that they did in fact go to the respondent's. These declarations were held admissible as a part of the *res gestae,* the court saying: "The mere act of going was equivocal; it might have been for professional advice and assistance. The declarations were of the same force as the act of going, and were admissible *as a part of the act.*"[6]

on a judgment confessed by J. for the purpose of fraud. On the trial, evidence was admitted of J.'s declarations before sale, while on his way to see one with whom he had made arrangements that he should buy the property. Held that the declarations were admissible, being a part of the fraudulent transaction. Davis v. Drew, 58 Cal. 152.

[4] Rogers v. Manhattan Life Insurance Co., 138 Cal. 285, 71 Pac. 348.

[5] Hinchcliffe v. Koontz, 121 Ind. 422, 23 N. E. 271, 16 Am. St. Rep. 403.

[6] In Hunter v. State, 40 N. J. L. 495, a man, afterwards murdered, made statements to his son, and wrote a note to his wife a few hours before leaving home on the night of the murder, to the effect that he was going to the city of Camden on business, and that the prisoner was going with him. It was held that such statements, both oral and written, were admissible as explanations and preparations of the act of going from home. The court said: "Now I think I may safely say that there are few problems involved in the law of evidence more unsolved than what things are to be embraced in these occurrences that are designated in the law as *res gestae.* The adjudications on the subject, more especially those in this country, are perplexingly variant and discordant. I can readily find judicial rulings by force of which this testimony would be excluded; but I can as readily find other rulings of equal weight that would sanction its admission. This result has grown out of the difficulty of applying, with anything like precision, general rules to a class of cases of infinite variety. In the well-considered case of Lund v.

So declarations of a pauper as to his intention in moving are ad-

Tyngsburgh, 9 Cush. (Mass.) 42, it is said: 'The *res gestae* are different in different cases; and it is, perhaps, not possible to frame any definition which would embrace all the various cases which may arise in practice. It is for the judicial mind to determine, upon such principles and tests as are established by the law of evidence, what facts and circumstances in particular cases come within the import of the term.' In the present instance the test thus indicated will be found, I think, in the rule that such declarations as these are admissible, because they are so connected with an act, itself admissible as a part of the *res gastae*, as to have become incorporated with it. The declaration and the act must make up one transaction. The theory justifying this course is, that when such declarations are thus coupled with a provable act, they receive confirmation from it; but if they stand alone, without such support, they depend altogether for their credence on the veracity of the utterer, and thus conditioned they are pure hearsay, and inadmissible. Alluding to the rule that excludes hearsay, Mr. Sparkie, vol. 1, p. 65, says: 'The principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the dispnted fact can reasonably be made.' The present point of inquiry therefore is, whether these declarations of Mr. Armstrong to his son and his similar declaration contained in the note to his wife, can reasonably be said to be component parts, or the natural incidents of the act of the deceased in going to Camden, which act was incontestably a part of the *res gestae*. After mature reflection and a careful examination of the authorities, my conclusion is, that these communications of the deceased should be regarded as constituents of that transaction, for I think they were preparations for it, and thus were naturally connected with it. In the ordinary course of things it was the usual information that a man about leaving home would communicate for the convenience of his family, the information of his friends or the regulation of his business. At the time it was given, such declaration could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong, and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion I think is, that a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company? At the time the words were uttered or written they imported no wrong-doing to any one, and the reference to the companion who was to go with him was nothing more, as matters then stood, than an indication of an additional circumstance of his going. If it was in the ordinary train of events for this man to leave word, or to state where he was going, it seems to me it was equally so for him to say with whom he was going. I am unable to see that the reference made to Mr. Hunter by the deceased was not as closely combined with the probable act of his going to Camden as were the inquiries made by Parkman as he passed through the streets of Cambridge, for the house of Dr. Webster, and those inquiries were admitted as evidence by Chief Justice Shaw. Report of Webster's case. It is true that in that instance the inquiries happened to be precisely contemporaneous with the act being done; but all the authorities admit that it would be absurd to

missible only when made accompanying and explaining the act of

require exact coincidence in point of time between the doing of the act and saying of the words explanatory of it. Thus, in the case already cited from 9 Cush., it is said: 'So declarations, to be admissible, must be contemporaneous with the main fact or transaction; but it is impracticable to fix by any general rule any exact instant of time, so as to preclude debate or conflict of opinion in regard to this particular point. Lord DENMAN is quite strong in his expressions on this subject, for in Rouch v. Great Western R. R. Co., 1 Q. B. 60, he uses this language: 'The principle of admission is, that the declarations are *pars rei gestae*, and therefore it has been contended that they must be contemporaneous with it; but this has been decided not to be necessary on good grounds, for the nature and strength of the connection with the act are the material things to be looked to, and although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential.' In the case now under consideration these declarations are so naturally, and therefore strongly, associated with the act in contemplation, that in my estimation the most exact contemporaneousness of the two things would give no additional force to the connection between them. There is nothing in the case to countenance the notion that any change of purpose occurred between the time of the expression of such purpose and the execution of it, so as there is no extraneous interference, the disclosure of the intention and its performance may be said to be, within the meaning of the authorities, one entire transaction. It is principally from the foregoing considerations that I find myself constrained to think that the declarations under discussion, even if they stood in the case unsupported or unaffected by other circumstances, were admissible, on general principles, on the single ground that they were natural and inartificial concomitants of a probable act, which itself was a part of the *res gestae*. In such a status of the evidence I should think that the exception to the principle that rules out hearsay had been carried to its extreme limit, but without transcending such limit."

In this case, it must be observed, there was nothing in the declarations going to charge the prisoner with any criminal intent or motive.

In Douglas v. Chapin, 26 Conn. 76, the plaintiff's intestate had contracted to go to California and take charge of defendant's steamboat. In an action on the contract, it was held that his statement on leaving San Francisco, that he was going up the river to Sacramento to go on board the boat, was admissible, as part of the *res gestae*, in proof that he so went. The court simply said, "It was manifestly a part of the *res gestae*."

In State v. Dula, Phillips (N. C.), 211, the deceased was met a few miles from the place where she was murdered, going on horseback in that direction. It was held that her declarations then and there that she was going to that place to meet the prisoner were inadmissible in evidence. The court said these declarations may have been true or may have been false, but were not verified by the tests which the law of evidence requires, namely, the sanctity of an oath, and an opportunity for cross-examination.

In People v. Williams, 3 Abb. Ct. App. Dec. (N. Y.) 596, on an indictment for poisoning, it was held that evidence that the deceased, on going out of the house just before she was poisoned, said she was going to meet the prisoner, was not admissible as tending to prove their meeting, even in connection with her illness on her return, and her attributing it to what he had given her to drink. The court, DENIO, J., said: "To render the declaration competent, the act with which it is connected should be pertinent to the issue; for where the act is in its own nature irrelevant, and when the declaration is *per se* incompetent, the union of the two will not render the declaration admissible. The material

moving.[7] On the issue of title to certain goods evidence is ad-

fact here was, that the prisoner and the deceased were together on Saturday night. Even this was not a principal fact, but only a circumstance to show that the prisoner had an opportunity to commit the offense. That the deceased left the house in Duane street at a particular time was of no materiality unless it was also shown that during her absence she met the defendant. The act itself was indifferent to the issue, whatever the intention with which it was done. If the deceased met the prisoner, and thus afforded an opportunity of committing the offense, it is immatrial whether she expected or intended to meet him or not; and so of course if she failed to meet him, he could not properly be prejudiced by the circumstance that she went out with a design to go to him. The evidence was not offered to qualify an act connected with the issue, but to induce the jury to infer another act not otherwise shown to exist, that of his being in company with the deceased. Suppose a declaration had been made by the deceased, on the previous day, of an intention to go to her husband on that particular evening; such declaration, being unaccompanied by any act, would rest whollly in assertion, and would be clearly without the rule referred to; yet the proof would be essentially of the same character, and subject to no greater objections than the evidence we are considering. I am of poinion, therefore, that the case was not within the rule admitting a declaration accompanying an act, on the ground of its being a part of the *res gestae*."

In Carroll v. State, 3 Humph. (Tenn.) 315, the declarations of the deceased while on a journey with the prisoner, and in State v. Vincent, 24 Iowa, 570, his declarations as to the object of a contemplated journey which he afterward took, were received in evidence. In neither case was there anything in the declarations tending to fasten any criminal intent on the prisoner.

In Cheek v. State, 35 Ind. 492, a witness was allowed to testify to the following declaration by the deceased concerning the prisoner just before his death: "Doc, I am glad you have come; there are two ruffians going up the road, and they have threatened to take my life; they have gone to my house, and I want you to go back with me." The court said: "Was it *res gestae?* We think not. Bouvier says: 'When it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence as a part of the *res gestae*, for the purpose of showing its true character' We think the books may be searched without success, to find a case where the statements of a murdered man, made before he came in sight or hearing of his slayer, can be given in evidence against the accused on his trial."

State v. Dickinson, 41 Wis. 299, was a criminal action for procuring the death of a pregnant woman by abortion. It was claimed that the death occurred on Saturday. The witness, Mary Erickson, was permitted to testify as to conversations had by her with the deceased on the previous Wednesday and Friday, in which the deceased stated that she understood or had found out that she was in a family way; that she had been to see the defendant about it; had been or was going to defendant to get medicine and syringe; that she had made an arrangement or bargain with defendant to have an operation performed upon her; was to give $25, and was to return to defendant's on Saturday afternoon for the purpose of having instruments used to get rid of the child. The prosecution offered this evidence to show that the deceased had at that time the intention of having an abortion produced. In his charge the judge so restricted the effect of the testimony, and directed the jury that all the declarations of the deceased made before she was informed she could not live, in which the defendant's name was connected, could

missible as part of the *res gestae* that before the purchase the defendant said to her husband that she was going to invest her money in goods and that her husband was to conduct the business for her and that she gave to her husband a list of certain goods to be purchased and that the money used in purchasing the goods was from her father's estate.[8] Where a husband is charged with making a fraudulent conveyance to his wife, testimony that the property was purchased with his wife's money, that when the

only be considered as evidence tending to show that at that time the deceased had formed the purpose to go to the defendant to have an abortion produced upon her, but was not evidence that the defendant actually produced the abortion or had engaged to do it. The court on review said: "The first inquiry is, whether the declarations of deceased to Mary Erickson were admissible for the purpose of showing her intention, and as their scope and effect were restricted by the court, we are of opinion that they were. They constituted a part of the *res gestae*, were contemporaneous with the main fact under consideration, and were so connected with it as to illustrate its character. 1 Greenl. Ev. 108. It was certainly competent to prove that the deceased went to the house of the defendant at the time it was charged in the information the abortion was produced. Upon the authorities, her intent or purpose in going there might be shown by her declarations then made or previously made, because such declarations became a part of the *res gestae*. For it is evident the declarations were connected with the act of her going to the defendant, were expressive of the character, motive or object of her conduct, and they are to be regarded 'as verbal acts indicating a present purpose or intention, and therefore are admitted in proof like any other material facts.' 1 Greenl. Ev. *supra;* Insurance Co. v. Mosley, 8 Wall. 397; Enos v. Tuttle, 3 Conn. 27; Corinth v. Lincoln, 34 Me. 310; Lund v. Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36; Nutting v. Page, 4 Gray (Mass.), 581; State v. Howard, 32 Vt. 380; Moore v. Meacham, 10 N. Y. 207; People v. Davis, 56 id. 96. It is obvious that the mere act of the deceased going to defendant's house was equivocal; it might be innocent or not; it might warrant the inference that she went for proper treatment of some ailment; the declarations would render her motive clear and intelligible. They therefore seem to us as falling under the denomination of the *res gestae*, and were admissible as original evidence, as distinguished from hearsay.

In People v. Davis, *ante*, when the deceased came home, in answer to inquiries from her stepmother she made statements telling what had been done to her by Dr. Crandall at his office, and how he did it, exhibiting certain medicine which she said the doctor gave her, and stated what he told her as to taking it when her pains came on. The court held these declarations incompetent because they were merely narratives of past occurrences, did not become a part of the thing done at the doctor's office, and were therefore no part of the *re gestae*. But the court say: 'Had it been shown that the medicine was to be taken to aid in producing the miscarriage, what was said in respect to it would have been admissible.' The conclusion which we have reached in view of all the cases upon the subject is, that the declarations of the deceased made to the witness Mary Erickson were so connected with her act of going to the defendant's as to constitute a part of that act, and were admissible as explanatory of that act. See Regina v. Edwards, 12 Cox's Cr. Cas. 230."

[7] Knox v. Montville, 98 Maine 493, 57 A. 792.

[8] Jones v. Chenault, 124 Ala. 610, 27 So. 515, 82 Am. St. Rep. 211.

original deed to him was taken he wanted it made to his wife and that he was advised to take title for his wife, is admissible. Where the good faith of an act is in question evidence of the intent with which it is done is admissible.[9]

Only such declarations are admissible as part of the *res gestae* as grow out of the matter in issue, so where a defendant was sued for killing the plaintiff's dog a statement made by his wife to him before the killing that the dog had snapped at her is inadmissible as part of the *res gestae*. In this case the principal fact is the killing of the dog and her antecedent statement cannot be said to grow out of such fact or transaction.[10] In a Georgia case,[11] two persons agreed to fight a duel, and then separated to arm themselves for that purpose, and agreed to meet again within an hour. The agreement was not carried out, but the respondent sought out the other party and killed him, and it was held that declarations of the deceased *made in the interval*, to third persons, to the effect that the respondent was seeking his life, were evidence against the respondent on an indictment for murder.[12] In a Tennessee case,[13] upon an indictment for murder, evidence was admitted of the declaration of the deceased, on the evening before he was missed, that he was going to the Pine mountain, to hunt a saltpetre cave. The court said: "It is part of the transaction; explains the reason why Elrod was in the Pine mountain, and constitutes a fact in the case." "This declaration, made, as it may be said, while on his way, and explaining the reason of his going, constitutes an important fact to elucidate the question of his death." But a declaration, "shortly before his death," that he had been to the mountain, and was going out shortly again, was held inadmissible. There was nothing in the evidence admitted tending to charge the prisoner with the murder, by the mere statement of the deceased. In the same case, on the subsequent trial,[14] evidence was admitted of the statement of the deceased, not

[9] McGhee v. Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567.

[10] Ehrlinger v. Douglas, 81 Wis. 59, 50 N. W. 1011, 29 Am. St. Rep. 863.

[11] State v. Cox, 64 Ga. 374, 37 Am. Rep. 76.

[12] WARNER, C. J., dissented, but we are inclined to believe that the doctrine announced by the court, while going to the very outer limits, is nevertheless sustained by respectable authorities, and does not impugn the rules and principles applicable to *res gestae*.

[13] Kirby v. State, 7 Yerg. (Tenn.) 259.

[14] Kirby v. State, 9 Yerg. (Tenn.) 381. In England such declarations are held not to be a part of the *res gestae*, and consequently not admissi-

only that he was going to the Pine mountain, but also that the prisoner was to accompany him and show him a saltpetre cave. For this error a new trial was granted. The court said: "How does this statement constitute any part of the thing doing? Whether Kirby was to accompany him or not, could not affect his intentions in going to the mountain, nor could his statement of that fact tend to explain his purpose in going there. His declaration of his own purpose is evidence, because it explains his intentions, and his intentions constitute part of the thing he was doing. He was traveling, and as he was going, he had certain intentions, and as these intentions could only be known by his declarations of them, such declaration is evidence. But it is impossible that Kirby's going with him could constitute any part of the thing which he was doing, which was his own journey."

On a trial for murder by poisoning, statements made by deceased in conversation shortly before he took the poison, have been received in evidence for the purpose of proving the state of his health at that time;[15] and, on the same ground, it has frequently been held, in actions or indictments for assault, that what a man has said about himself to his surgeon was evidence to show what he suffered by reason of the assault.[16] Where, upon an indictment for an abortion, the fact of a deceased party going to the respondent's house for the purpose of having him commit an abortion was material, it was held that *her declarations as to her purpose in going there, made at the time of her leaving,* were competent as a part of the *res gestae*.[17] So, where a respondent was indicted for discharging a gun at a person and wounding him, and the person injured was a witness on the trial, and it appeared that the affray took place on the premises of the respondent, it was held that the respondent might prove the declarations of the witness, made while on his way to the place where the affray happened, the witness, upon being inquired of on cross-examination, having denied them. In such case, evidence might be proper of previous threats made by the witness as to the respondent, and of previous affrays between them, if so connected with the affray in question as to have any tendency to show that the respondent, at the time,

ble. Reg. v. Wainwright, 13 Cox C. C. 171; Reg. v. Edwards, 12 id. 230; Reg. v. Buckley, 13 id. 293.

[15] R. v. Johnson, 2 C. & Kir. 354.

[16] Aveson v. Lord Kinnaird, 6 East, 198, *per* LAWRENCE, J.; R. v. Guttridge, 9 C. & P. 472, *per* PARKE, B.

[17] State v. Howard, 32 Vt. 380.

had just cause of alarm, and to fear serious injury to his person or property.[18]

In actions for criminal conversation, if it is material, with the view of increasing or diminishing the damages, to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence.[19] But to guard against the abuse of this rule, it must be proved by some evidence independent of the date appearing on the face of the letters,[20] that they were written by the wife to the husband prior to any suspicion of misconduct on her part, and when, consequently, no grounds existed for imputing collusion.[21] It is not, however, necessary, in the absence of other suspicious circumstances, to explain the cause of the husband and wife living apart at the time when the letters were written, though, of course, it is expedient that such explanation should, if possible, be given.[22]

Sec. 137. Collateral Matters connected with Principal Fact.

There are *other declarations and acts*, which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character and essential to be known, in order to a right understanding of its nature. These surrounding circum-

[18] State v. Goodrich, 19 Vt. 116.

[19] Trelawney v. Coleman, 1 B. & Ald. 90; Willis v. Bernard, 8 Bing. 376; Winter v. Wroot, 1 M. & Rob. 404; Gilchrist v. Bale, 8 Watts (Penn.), 355.

[20] Trelawney v. Coleman, 2 Stark. 193, *per* HOLROYD, J.; Houliston v. Smyth, 2 C. & P. 24, *per* BEST, C. J. This last case was an action for board and lodging supplied to a wife, while living separate from her husband, in consquence of his cruelty; and letters, purporting to be written by the wife, were tendered by the husband to rebut this charge, but were rejected, on the ground that no proof was given, beyond their date, of the time when they were sent. See *ante*, § 110, where this exception to the general presumption respecting dates is accidentally omitted.

[21] Edwards v. Crock, 4 Esp. 39; Trelawney v. Coleman, 1 B. & Ald. 90; Wilton v. Webster, 7 C. & P. 198.

[22] Trelawney v. Coleman, 2 Stark. 191.

stances may always be shown to the jury along with the principal fact, provided they constitute parts of what are termed the *res gestae;* and whether they do so or not must in each particular case be determined by the judge in the exercise of his sound discretion, according to the degree of relationship which they bear to that fact.[1] Thus, on the trial of Lord George Gordon for treason, the cry of the mob, who accompanied the prisoner on his enterprise, was received in evidence, as forming part of the *res gestae,* and showing the character of the principal fact.[2] On the issue of the excellence of a theatrical performance the remarks of the audience while leaving the theatre before the end of the performance are admissible as part of the *res gestae* characterizing the act done.[3] In a suit by a passenger on a street railway

[1] *Per* Park, J., in Rawson v. Haigh, 2 Bing. 104; Ridley v. Gyde, 9 Bing. 349, 352; Pool v. Bridges, 4 Pick. (Mass.) 379; Allen v. Duncan, 11 Pick. (Mass.) 309. If goods consigned by A. to B., are injured by the defendant whilst they are in the hands of the carrier, in an action for the wrong, brought either by A. or B., according to the circumstances, it would be competent to either of them, being plaintiff, to establish his right of property in the goods, by proof of such an agreement between them as either left the right of property and action in himself, or vested it in him by the delivery to the carrier. This would be, it is true, nothing more than an agreement between A. and B., to which the defenndant was not privy; but it would be evidence against him, not as concluding any right of his without his assent, but as affecting the nature of the transaction itself, and showing to whom the injury was done. 1 Stark. Ev. 53; Murry v. Bethune, 1 Wend. (N. Y.) 196. In the example put, it may be material to see the letters which had passed between A. and B., the direction of A. to his clerks or to the carrier, from which to infer the terms of the agreement and the identity and destination of the goods. In a late case the plaintiff sued out a foreign attachment against B., summoning the defendant as garnishee. The summons was served in November, 1828. On the 21st of the previous July the garnishee had thirty barrels of B.'s gin in his hands, which, by letter of that date, he was directed by B. to hold, with the proceeds of that sold, if any, subject to the order of G.; and, by letter of the August following, the garnishee had acknowledged that he held the gin and proceeds on account of G. These letters were at first excluded as not being evidence of the garnishee, under the notion that they were naked declarations; but on appeal, the Supreme Court held them clearly admissible, as evidence of the agreement by which the gin was transferred to G. Cox v. Gordon, 2 Dev. (N. C.) 512; Jones v. M'Neil, 2 Bail. (S. C.) 471. On the other hand, the holder of a check went into the bank, and when he came out, said he had demanded its payment. This declaration was held inadmissible to prove a demand, as being no part of the *res gestae.* The demand was the fact to be proved. Brown v. Lusk, 4 Yerg. (Tenn.) 210.

It is difficult to lay down any precise general rule as to the cases in which declarations are admissible as part of the *res gestae,* and the only way of useful instruction is to present the cases that have arisen under this head and judge of the application of the rules from these experimental tests.

[2] 21 How. St. Tr. 514, 529.

[3] Charley v. Potthoff, 118 Wis. 258, 95 N. W. 124.

car for being ejected from the car, testimony that during his colloquy with the conductor and while he was being put off his little girl and little boy with him were both crying and that he "thought the little girl would go into spasms" was admissible as part of the *res gestae*.[4] In an action for the death of an engineer employed by a railroad company, through the giving way of the bridge, evidence that a bystander watching the deceased attempting to take his engine across the bridge said at one time, "Jake is safe," is competent evidence as part of the *res gestae*, going to show the dangerous condition of the bridge and the peril of crossing and the effect the effort to cross had on the bystanders.[5] On the issue of the prudence of a passenger in jumping off a car when an accident seemed impending, it is proper to consider what the action of the other passengers was as part of the *res gestae*.[6] In an action against a railroad for failure to protect the plaintiff, a passenger, from a mob, a witness may testify to what he said to the plaintiff during the disturbance, exclamations by third parties at the time being part of the *res gestae*.[7]

But where a brakeman was injured through the uncoupling of a train, in an action for the injury he may not testify that immediately after the accident, while he was binding up his wound, a bystander, since deceased, told him the train was parted when it passed him.[8] A remark made by a bystander when the plaintiff fell off a car, "if you had stopped and let her off this would not have occurred," to which remark the conductor made no reply, is not admissible as part of the *res gestae*. The test seems to be that to render the utterance or declaration of another admissible it must flow from one of the actors or from one sustaining some relation to the transaction and be so intimately connected with the litigated act as to be the act speaking of itself through the witness.[9] In Louisiana it is said that exclamations by third persons present at a shooting affray are not admissible as part of the *res gestae* to show that the act was not done by the accused, but by

[4] O'Rourke v. Street Railway Co., 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 179.

[5] Harrill v. South Carolina & Georgia, etc., Ry. Co., 135 N. C. 601, 44 S. E. 109.

[6] Chretien v. New Orleans Rys. Co., 113 La. 761, 37 So. 716.

[7] Seawell v. Carolina Central Railway Co., 133 N. C. 515, 45 S. E. 850.

[8] Bumgardner v. Southern Ry. Co., 133 N. C. 784, 43 S. E. 948.

[9] Indianapolis St. Ry. Co. v. Taylor (Ind., 1905), 72 N. E. 1045.

others. The court held such evidence to be mere hearsay. The court distinguishes the Lord George Gordon case where the cries of the mob were introduced in evidence on the ground that this evidence was necessary to show the character of the mob with Gordon, as he was charged with treason.[10] In an action for injury to a horse by an escape of electricity from a street railway track, a statement of the driver to his companion when the horse stopped on the track, "He has got a shock, Sam, catch hold," is admissible as part of the *res gestae*.[11] So, upon

[10] State v. Bellard, 50 La. Ann. 594, 23 So. 504, 69 Am. St. Rep. 461.

[11] Trenton Passenger Railway Co. v. Cooper, 60 N. J. Law, 219, 37 A. 730, 64 Am. St. Rep. 592.

At the trial of a husband's libel for divorce on the ground of adultery, E. testified to seeing the libelee sitting in R.'s lap. R.'s wife testified that she requested her husband to hold the libelee in his lap, she being ill at the time, while the bed was making. R.'s wife testified that she left the room for a few minutes while her husband was holding the libelee, and when she returned he told her that E. had been in. R. testified to the occurrence substantially as stated by his wife, adding that E. came in while his wife was absent, and that he mentioned the fact to her when she came back. It was held that the statement of R. to his wife was competent as in the nature of a verbal act identifying the occasion as the same testified to by E. Earle v. Earle, 11 Allen (Mass.), 1. In an action against a surgeon, for negligently treating a fractured thigh bone, the defendant, in support of his allegation that he had placed the fractured limb upon a double-inclined plane, at an angle of forty-five degrees, or thereabouts, introduced a witness who testified to statements made in the presence of the plaintiff, by the defendant to the witness, at the time when the defendant brought the machine to the plaintiff's house, about the principle upon which the machine operated, and how it might be made a double-inclined plane of any angle, by means of a screw. The evidence was admitted, and on exceptions, the court held that, both as *res gestae* and as a statement made in presence of the party, they could not say that it was erroneously admitted. Moody v. Sabin, 9 Cush. (Mass.) 505.

An officer, called as a witness for the commonwealth in a criminal case, was asked what he did in consequence of what was told him as to the commission of the offense, and answered that he started to look for the defendant; and the presiding judge admitted the answer in evidence. It was held, that the defendant had no ground of exception. Commonwealth v. Moulton, 4 Gray (Mass.), 39.

The plaintiff sued the defendant for entering upon his land and digging a ditch there. The defendant justified on the ground that he only cleared out an ancient ditch as he had a right to do, to drain his own land above the plaintiff's. The plaintiff formerly owned the defendant's land, and sold the same to him; and C. formerly owned the plaintiff's land. It was held, that declarations of the plaintiff to the defendant, while owner of the defendant's land, and while negotiating the sale of it to the defendant, that he had a right to drain it over C.'s land, were admissible in evidence. Stetson v. Howland, 2 Allen (Mass.), 591. So, also, where a person enters upon land in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseizin, Co. Lit. 49 b, 245 b; Robinson v. Swett, 3 Me. 316; 3 Bl. Com. 174, 175, or the like; or changes his actual residence or domicil, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself; or, in fine, does any other act, ma-

an inquiry as to the state of mind, sentiments, or dispositions of a person at any particular period, his contemporaneous declarations are admissible as parts of the *res gestae*.[12] Where one buys realty and has it placed in his wife's name, only his contemporaneous acts and declarations are admissible to rebut the presumption of a gift.[13] Declarations of a party on closing an alley that he did so to prevent the public from acquiring rights by adverse user are admissible.[14] Evidence is admissible to show that an owner of stock put it in the hands of a third party for transfer to any one whom his broker might procure as purchaser, and he may also prove his declarations made at the time of placing the stock in the hands of the third party tending to show that his act was in performance of his contract with the broker.[15] Where it is material to ascertain whether one was riding on a train lawfully, it was competent to prove for what purpose he boarded the train by his statements and declarations, made at or about the time he was in the act of getting upon the train.[16] On the question whether a donor was acting for himself or as agent for another his declarations made at the time of the gift are admissible as part of the *res gestae,* but not when made some time after the gift, on the question whether it was a gift or an advancement.[17] The acts, appearances, and declarations of those charged with crime are admissible when so interwoven with each other and with the crime that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion.[18] In a suit for enticing away a servant, the servant's statement at the time of leaving his master will be received, as tending to show the motive of his departure;[19] and

terial to be understood; his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts. Bateman v. Bailey, 5 T. R. 512, and the observations of Mr. Evans upon it, in 2 Poth. Obl. App. No. xvi. § 11; Rawson v. Haigh, 2 Bing. 99; Vacher v. Cocks, M. & M. 353; Smith v. Cramer, 1 Bing. N. C. 585; Doe v. Arkwright, 5 C. & P. 575; Gorham v. Canton, 5 Me. 266; Thorndike v. City of Boston, 1 Met. (Mass.) 242.

[12] Barthelemy v. The People, &c., 2 Hill (N. Y.), 248, 257.

[13] Johnson v. Johnson, 96 Md. 144, 53 A. 792.

[14] Burgess, etc., of New Windsor v. Stockdale, 95 Md. 196, 52 A. 596.

[15] Mittingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am. St. Rep. 87.

[16] Matthews v. Great Northern R. R. Co., 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 363.

[17] Johnson v. Cole, 178 N. Y. 364, 70 N. E. R. 873.

[18] St. Clair v. United States, 154 U. S. 134, 149, 14 S. Ct. 1002.

[19] Hadley v. Carter, 8 N. H. 40.

where an action of trover was brought against the assignees of a bankrupt, and it appeared that the plaintiff, at the recommendation of the bankrupt, had sent some goods to a dyer, and had told him that the bankrupt would call and give directions about them, it was held that these directions should have been submitted to the jury on behalf of the assignee, as affording some evidence of a dealing with the goods, if not of the consent of the true owner to such dealing.[20]

[20] Sharp v. Newsholme, 5 Bing. N. C. 713.

In an action on the warranty of a horse, the question being whether it had fits, and it being proved that the plaintiff kept it in his livery stable, though its labor was needed, a witness testified that he was directed by the plaintiff not to let it because it had fits. It was held, that this testimony was admissible as part of the *res gestae*. Hersom v. Henderson, 23 N. H. 498.

So where the purchase of a horse returned it to the vendor with a message that "he would fix it all right," it was held, that the fact might be considered by the jury with other corroborative facts, in determining whether the purchaser had promised to pay for the use of the horse, if the jury were satisfied that the declarations were part of the act of redelivering the horse. Knauss v. Shiffert, 58 Penn. St. 152.

Where property was sold and transferred for the purpose of paying debts due to the vendee and to other creditors, the declarations of the vendor and vendee, *at the time of the delivery of possession under the sale*, were held admissible as part of the *res gestae*, as was the paper by which the vendor assumed to pay the debts, to rebut the allegation of fraud; and also evidence that before the date of the sale the vendee had borrowed money for the purpose of reloaning it to the vendors. York County Bank v. Carter, 38 Penn. St. 446.

In a Missouri case, a husband dying, his widow and heirs made a division of his estate, including slaves, among them. The widow afterwards dying, the administrators of the husband instituted suit against persons claiming under the widow, for the possession of certain slaves that had been assigned to the widow. It was held, that a bond executed by the heirs at the time, binding them to abide by the division, but which was not signed by the widow, though read over to her and not objected to, was admissible in evidence as part of the *res gestae*, in behalf of the administrators, to show that the assignment was made to the widow as dower and not absolutely. Salmons v. Davis, 29 Mo. 176.

Where the issue was, whether certain property had been sold to the defendant or a third person, it was held competent for the plaintiff to show that just before the sale he had been advised not to sell the property to such third person, and that he may prove this by the person who gave him the advice. Bronner v. Frauenthal, 37 N. Y. 166. Where it is sought to prove a sale of goods, and a warranty thereof, it is proper to show all that was said by the parties during the pendency of the negotiations. Elliott v. Stoddard, 98 Mass. 115. Where property is sold at a public sale, declarations of bystanders are held admissible as evidence in regard to it. Stewart v. Severance, 43 Mo. 322. Where a person, at the time of loaning money, declares that it is trust money, or money that belongs to a ward, it is competent to be shown by him. Beasley v. Watson, 41 Ala. 234. Where a stock of goods has been attached by a sheriff as the property of A. which are claimed by B. by virtue of a sale from A. to him, it is competent, in a suit to test the validity of B.'s title thereto, for B. to show, by one who was called in to take an account of the stock, a conversation at the time, between A. and B., that the account

Statements by a party in his own favor are not admissible in evidence unless they are part of the *res gestae*. In one case where the possession of money was in issue and the mortgagor claiming to have the money claimed it was buried in a jar in the cellar she went down cellar with her daughter at one time and pointed out the place in the cellar where she said the money was buried, it was held that this statement was not admissible as part of the *res gestae*, for the reasons that neither the mortgagor nor her daughter actually saw the money or the jar in which it was contained.[21]

So, a card signed by the passengers on a train at the time of an accident, which was not signed until two days after the accident occurred, exonerating the officers from all blame, is not admissible as part of the *res gestae* in a suit against the company for damages.[22] But it is held that the acts and declarations of the donor and donee at the time of an alleged gift are competent to be shown to prove delivery, and a subsequent recognition by the donor of the donee's title may also be shown.[23] Also that the statements of officials having the direction of public work, made during the time that the work was being prosecuted for a municipal corporation, to persons engaged upon it, are admissible to show the manner and circumstances under which the work was begun and prosecuted.[24] The surrounding circumstances leading to the passage of

of the stock was to be taken for the purpose of turning it over to B. to satisfy a debt due to him from A. But in such a case it is not competent for the sheriff, or other person, who is claiming to hold the goods as A.'s property upon the attachment, to show the declarations and conduct of A. at the time when the attachment was made, and not qualifying or explaining any material fact in the case *not* admissible. Pullman v. Newberry, 41 Ala. 168.

[21] Pinney v. Jones, 64 Conn. 545, 30 A. 762, 42 Am. St. Rep. 209.

[22] Macon, &c., R. R. Co. v. Johnson, 38 Ga. 409.

[23] Bragg v. Massie's Adm'r, 38 Ala. 89.

[24] Maher v. Chicago, 38 Ill. 266.

In an action against a railroad company for a breach of contract in the transportation of goods, the declarations of the engineer having charge of the train in which the goods were being transported, in reference to the cause of the delay, were held admissible as a part of the *res gestae*. Sisson v. Cleveland, &c., R. R. Co., 14 Mich. 489. In an action upon a bond, given to release a barge which had been attached to enforce a lien upon it for lumber sold to the builder by the plaintiff, it was held that the declarations of the builder to the plaintiff while transacting the business as to the person for whom he purchased it, and as to the amount required in building the barge, were admissible as part of the *res gestae*. Happy v. Mosher, 47 Barb. (N. Y.) 501. So declarations made by the husband at the time of giving his wife money, as to the purpose for which he gave it, as well as his representations as to the person for whom he was acting when he received a bill of sale for his wife, are

a statute authorizing a city to make a contract are admissible to aid in its construction.[24a]

The statements of an agent engaged in conducting the business of his principal relating to a transaction then depending are of the *res gestae*.[25] Statements made by an agent during the burning of a building as to the cause of the fire are merely narratives of a past transaction, viz., the cause of the fire, and are not part of the *res gestae*.[26] But statements of a servant of a distiller, as to the condition of a vat which had given way, made within five or ten minutes of the accident, and while engaged in rescuing and caring for the plaintiff, who was scalded by the boiling liquor, are admissible as part of the *res gestae*. The court admits them as made, "in the full heat and excitement of the catastrophe."[27] Entries in books of a third party, an agent of the plaintiff, are not admissible as part of the *res gestae*, to show payment of a note sued upon.[28]

It is held that, where a person's personal habits may furnish a key to the act in question, they may be shown. Thus, when a note was claimed to have been given to the plaintiff on Sunday, it was held competent for him to show that he was the superintendent of a Sabbath school, which he invariably attended.[29] Declarations of the testator, at the time when a will is executed, are proper and competent evidence upon the question of capacity.[30] So it is held that the declarations of a principal to a note,

held admissible in an action in favor of the wife. Kells v. Campbell, 2 Abb. App. (N. Y.) 492.

In a suit by a creditor of the husband to set aside a deed of gift made by a third person to the wife, on the ground that the property was purchased with the husband's money, and the deed a fraud, evidence of conversations between the grantor and the person who negotiated the sale for the wife at the time of the sale, were held properly admissible. Tevis v. Hicks, 41 Cal. 123. In an action against one for false representations in the sale of property, it was held competent for him to show that similar representations were made to him by credible persons previous thereto, the evidence having a tendency to acquit him of bad faith in making the representations. Beach v. Bemis, 107 Mass. 498. What is said by a person at the time of an accident caused by him, which has a tendency to prove that the accident was caused by his carelessness, is admissible to establish his negligence, as a part of the *res gestae*. Courtney v. Baker, 34 N. Y. Sup. Ct. 529.

[24a] Old Colony R. Co. v. Boston, (Mass., 1905), 75 N. E. 134.

[25] Hoffman v. Chicago Title & Trust Co., 198 Ill. 452, 64 N. E. R. 1027.

[26] Balding v. Andrews, 12 N. D. 267, 96 N. W. 305.

[27] Hupfer v. National Distillery Co., 119 Wis. 417, 96 N. W. 809.

[28] McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 A. 49.

[29] Blackwell v. Hamilton, 47 Ala. 470.

[30] Bates v. Bettis, 27 Iowa, 110; 1 Am. Rep. 260.

as to the relations thereto of other parties whose names are thereon, made to the plaintiff at the time of obtaining his signature thereto, are admissible as a part of the *res gestae*.[31]

A statement by a public official at the time he turns over funds in his hands to his successor is admissible as evidence against his sureties as part of the *res gestae*.[32] In an action for injuries in a collision on a railroad the trainmen's interpretation of the dispatcher's orders is admissible as part of the *res gestae* for the purpose of showing why they moved their trains as they did.[33] On the issue of an alleged gift of a note by a decedent to his niece evidence is admissible that she declared to others that she had the note in her possession and declared the deceased had given it to her during his last illness immediately before his death.[34] Where suit is brought on a claim that the defendant has driven the plaintiff's horses out of a pasture so that they were lost, a statement by the defendant's servant while he was driving the horses out of the pasture to the effect that if the horses were found there again they would be scattered so that they would never be found is not admissible against the defendant. This was not a statement with reference to the act then being done, but declared a purpose to do a similar act in the future in a particular manner, and as such is inadmissible as part of the *res gestae*.[35]

In an action against a physician or surgeon for malpractice,

[31] Whitehouse v. Hanson, 42 N. H. 9.

[32] Paxton v. State, 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 689.

[33] Wallace v. Boston & Maine R., 72 N. H. 504, 57 A. 913.

[34] Martin v. Martin, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290.

[35] Waggoner v. Snody (Tex., 1905), 85 S. W. 1134.

So, where a married woman has signed and acknowledged a deed of lands, jointly with her husband, in proceedings instituted by her to set aside the deed on the ground of fraud or duress, she may show the state of her mind and health at the time of her acknowledgment, and that her husband had preceded this by threats and menaces, which had put her in terror, and induced the act against her will. Central Bank v. Copeland, 18 Md. 305. So it is held that the declarations of a grantor, at the time of the execution of a deed for the benefit of his creditors, are properly admissible as a part of the *res gestae* in a suit brought to set aside the conveyance on the ground of fraud. Potter v. McDowell, 31 Mo. 62; Gillett v. Phelps, 12 Wis. 392. So declarations of a grantor of real estate, made at the time when the conveyance is executed, are admissible to show the intention of the grantor in making the conveyance; Kent v. Harcourt, 33 Barb. (N. Y.) 491; Badger v. Story, 16 N. H. 168; Gamble v. Johnson, 9 Md. 605; but declarations or admissions made by a grantor *after* the conveyance is executed are not admissible. Myers v. Kinzie, 26 Ill. 36.

their statements made in the presence of the plaintiff during his treatment, or at the time when the plaintiff is discharged from further treatment, are always admissible as a part of the *res gestae*.[36] So the declarations of a party, at the time of paying money to a creditor, are admissible for the purpose of showing what application was to be made of it;[37] the declarations of the vendor of goods made at the time of the sale are a part of the *res gestae* for the purpose of establishing the sale and its purpose;[38] and in fact everything that takes place between the parties to a verbal contract before its completion;[39] and it may be stated, generally, that whenever it becomes material to ascertain the nature of a particular act, and the intention of the person who did it, what he said and did at the time of doing it is always admissible as a part of the transaction itself;[40] as to ascertain the malady, or the true nature of its effects and symptoms, of a sick or injured person, whether made to a physician or others, but such declarations are entitled to more weight when made to a physician during his treatment of the patient.[41] So the declarations of the owner of lands claimed to have been dedicated to the

[36] Piles v. Hughes, 10 Iowa, 579. Where, in an action for malpractice by a surgeon in treating a dislocation, as a fracture, it was shown that if his diagnosis was correct, a grating sound would have been heard upon manipulation of the limb, and it was held that declarations made by persons who were present at the time of the examination that they heard such a sound were admissible. Hitchcock v. Burgett, 38 Mich. 501. Where a person is sued for an assault and battery, when the evidence tends to show that the defendant was assaulted by the plaintiff and others upon the occasion when the injury sued for was inflicted, the declarations of any of the persons engaged in the assault upon him, as to their intention and purpose, are held admissible as a part of the transaction. People v. Roach, 17 Cal. 297. Where personal property is sold and left in the possession of the vendor, as agent of the vendee, in an action to test the validity of the sale it is held that the declarations of the vendor and vendee at the time of the sale are admissible. Clark v. Rush, 19 Cal. 393. Where it becomes material to show whether a deed was delivered as an escrow, the acts and declarations of a party, preceding the execution of the deed by him, may be shown. Cheswell v. Eastham, 16 N. H. 296; Badger v. Story, 16 id. 168. Declarations made by a husband, at the time when money belonging to his wife comes into his possession, are, if evincive of his purpose and intention, admissible as evidence, when material, upon the question as to whether such money was received in trust for his wife, or whether he intended to reduce it to his own possession. Johnson v. Johnson's Ex'rs, 31 Penn. St. 450; Gicker's Adm'r v. Martin, 50 Penn. St. 138; Moyer's Appeal, No. 44, Weekly Notes of Cases (Penn.), 527.

[37] Bank of Woodstock v. Clark, 25 Vt. 308.

[38] Dale v. Gower, 24 Me. 563.

[39] Pierson v. Hoag, 47 Barb. (N. Y.) 243.

[40] Curtis v. Moore, 20 Md. 93.

[41] Stone v. Watson, 1 Ala. 236; Perkins v. Concord R. R. Co., 44 N. H. 223.

public, both before and after their use by the public, to show his intention.[42] So instructions given by a principal to his agent in reference to the delivery of a message to, or the making of a demand of, another, when the message is delivered or the demand made.[43] What is said by the parties to a sale in reference to it during the pendency of negotiations.[44] What is said by a person when paying money to another, as to the application of it, or as to whose money he is paying.[45] To show whether goods were sold by one as his own, or as the agent of another, his declarations at the time of the sale are admissible.[46] To show what title one claims to property in his possession, his declarations relative thereto while he has the property in his possession are admissible.[47] So where one sues for injuries done to his property by another, while the property was in the possession of a servant, the declarations of a servant at the time of the injury as to the cause thereof are admissible.[48] So it has been held that the exclamations of passengers on a railway train at the time of the happening of an accident;[49] the declarations of bystanders at a public sale;[50] the acts and sayings of a constable at the time of making a levy;[51] of a public surveyor when running a line to establish the character or purpose of the survey;[52] what is said by a claimant to the sheriff at the time of a levy;[53] what is said by a person while engaged in carrying away property claimed by another;[54] what is said by the plaintiff in a writ of attachment, as to his reasons for having it issued, made at the time of its issue.[55] Negotiations between parties are admissible to show to whom credit was given, and to explain the transaction;[56] instructions given by one of the parties to an assistant;[57] what is said by a person when money is paid to him, to show whether it was received in full or not, as well as to show upon what debt it was to be applied;[58] statements

[42] Buchanan v. Curtiss, 25 Wis. 991: 3 Am. Rep. 23.
[43] Featherman v. Miller, 45 Penn. St. 96.
[44] Atherton v. Tilton, 44 N. H. 452.
[45] Carter v. Beals, 44 N. H. 408.
[46] Milne v. Leisler, 7 H. & N. 786.
[47] Patterson v. Flanagan, 1 Ala. (S. C.) 427.
[48] Toledo R. R. Co. v. Goddard, 25 Ind. 185.
[49] Galena R. R. Co. v. Fay, 16 Ill. 558.
[50] Stewart v. Severance, 43 Mo. 322.
[51] Arnold v. Gorr, 1 Rawle (Penn.), 223: Dobb v. Justice, 17 Ga. 624: Grandey v. McPherson, 7 Jones (N. C.), 347.
[52] George v. Thomas, 16 Tex. 74.
[53] Morgan v. Simms, 26 Ga. 283.
[54] Drumwright v. State, 29 id. 430.
[55] Wood v. Banker, 37 Ala. 60.
[56] Eastman v. Bennett. 6 Wis. 232.
[57] Wilson v. Smith, 28 Ill. 495.
[58] Dillard v. Scruggs, 36 Ala. 670.

made by a person at the time when a demand is made upon him for property, or for any purpose;[59] the declarations of a servant at the time of leaving his master;[60] the declarations of a person engaged upon work, to show for whom he was working and the nature of the contract;[61] the declarations of a person on leaving home as to where he was going and the nature of his business;[62] declarations of the principal to a note, as to the relation of those whose names are already upon it, made to one whose signature he obtains thereto;[63] declarations of one in the possession of property, made at the time when the property was delivered to him, to show the nature and purpose of his possession,[64] have been held admissible as a part of the *res gestae;* as the declarations of the vendor before the sale as to the character or quality of the goods;[65] or of one in the possession of land, as to the extent of his claim, and the character of his occupancy;[66] or his intention in doing a certain act, as that, by clearing land and burning charcoal thereon, he intended to settle and improve the lands.[67] So it has been held that the declarations of a person having personal property in his possession, made before any claim is made to the property by another, may be given in evidence in an action between him and a person claiming the property, but that the weight to be given to such evidence is for the jury.[68] Thus it will be seen that, whenever the acts or declarations of a party, made at the time of a transaction, and so intimately connected therewith as to form a part of it, which tend to explain the transaction, or to aid in arriving at the real nature, character, and purpose of the transaction, are admissible in evidence as well for as against the party making them; and such evidence is admissible not only in actions between the parties themselves, but also in actions for or against their personal representatives, or those who are privy in interest with the parties. The justice of the rule, permitting all the acts and declarations of a party immediately connected with it, and ma-

[59] Lamphy v. Scott, 24 Miss. 528.
[60] Hadley v. Carter, 8 N. H. 40.
[61] Printop v. Mitchell, 17 Ga. 558.
[62] State v. Howard, 32 Vt. 380; Autauqua Co. v. Davis, 32 Ala. 713.
[63] Whitehouse v. Hanson, 42 N. H. 9.
[64] State v. Schneider, 35 Mo. 533; Johnson v. Boyles, 26 Ala. 576.
[65] Land v. Lee, 2 Rich. (S. C.) 168.
[66] Sailor v. Hertzogg, 2 Penn. St. 182.
[67] Jones v. Brownfield, id. 55.
[68] Gerry v. Terrill, 9 Ala. 206; Horton v. Smith, 8 id. 73; Trotter v. Watson, 6 Humph. (Tenn.) 509.

terial thereto, to be given in evidence to show the real intention, object and purpose of parties to a contract, when any reasonable doubt exists from the language of the contract itself, as well as the acts and declarations of parties to *any* transaction, to show the real nature and character of the transaction or act, is unquestionable. The real intention of a person in a transaction, which is not reduced to writing, can be gathered in no other way. Men act from secret motives, and their *declared* intention is very often quite at variance with the *real* motive which actuates them. Therefore, the only real key thereto is their acts, and any act calculated to throw light upon that point, and intimately connected with it, are always admissible. Thus, it has been held that, when fraud in the purchase or sale of property is in issue, it is competent to show other similar frauds committed by the *same* parties, at or near the same time, as tending to establish the *animus* of the parties in the transaction in question, and to show their fraudulent intent—as, in a proceeding for the forfeiture of a distillery for fraudulent distillation, it has been held competent to show the fact that, by the decree of another court, liquors from the same distillery had been forfeited.[69] So, it has been held competent to show in a proceeding for a forfeiture under the Internal Revenue Law, that the defendants have been guilty of other similar frauds, in order to establish their fraudulent intent.[70] So, in an action against a commission merchant for fraudulently selling the goods of a customer to an insolvent purchaser, evidence of similar fraudulent acts at about the same time have been held competent upon the question of intent,[71] and in proceedings for forfeiture, under the Customs Law, by means of false invoices, or undervaluation of goods, it is held that evidence of previous similar transactions, both before and after the transaction in question, may be shown.[72] Thus it will be seen that, while, in order

[69] United States v. One Distillery, 2 Bond (U. S.), 399; Butler v. Watkins, 13 Wall. (U. S.) 456.

[70] United States v. Merriam, 3 Chicago Legal News, 114; United States v. Thirty-six Barrels of High Wines, 7 Blatch. (U. S.) 469; United States v. Four Cases Merinoes, 2 Paine (U. S.), 200.

[71] Garth v. Bullard, 23 How. (U. S.) 172.

[72] Taylor v. U. S., 3 How. (U. S.) 197; Wood v. N. Y., 16 Pet. (U. S.) 342; Buckley v. U. S., 4 How. (U. S.) 251; Alfonso v. U. S., 2 Story (U. S.), 421. In Rex v. Davis, 6 C. & P. 177, it was held that, in a prosecution for receiving stolen goods, it was competent to show that the respondents, who were pawnbrokers, had received other stolen goods from the *same person*, with a view to establish the *scienter*. But, while the rule as applied to this case, and

to show a person's intent in a particular matter, transactions between the *same parties* of a *similar character* may be shown, similar transactions between *other* persons, to which one of the parties was a party, are *never* admissible.[73]

Sec. 138. Declarations as to Title and Possession of Lands.

It is not necessary, in order to warrant such evidence, that the act done with which the declaration is connected, should be a single effort or a positive transaction in the common sense of the term. *It may be continuous for a series of years, and of a passive or negative character.* Thus possession of real estate for a long time may be qualified and explained by the declaration of the possessor, the apparent owner in fee being thus cut down to the mere *squatter,* or the apparent *squatter* elevated to the owner in fee, as is done every day in our courts.[1] So also the apparent general owner of personal property may be turned into a bailee or trespasser, and *e converso.* And see the subsequent notes. Long forbearance may, in like manner, be shown to signify absolute title, or temporary tenancy in another, and an apparent legal resident or citizen reduced to the temporary sojourner. And it makes no difference whether the declarant is alive, and a competent attainable witness, or is dead. The declaration is identical with the act, and may be proved in the same manner as might the hand and seal of the declarant, either by himself, or by any person who saw him sign and seal.

generally as restricted in that case to transactions between the *same parties,* may not be obnoxious to criticism, yet the case itself, and the consideration given the question by GURNEY, J., on the trial, does not entitle it to great weight as an authority. The same rule, however, was adopted in Rex v. Dunn & Smith, 1 M. C. C. 147. In Coleman v. The People, 55 N. Y. 81, it was held that evidence that the respondent had received other stolen property from *other* persons was not admissible to establish the *scienter;* and in People v. Corbin, 56 N. Y. 363; 15 Am. Rep. 427, it was held that evidence of *other forgeries* by the respondent was not admissible in a prosecution against him for forging the name of *another* person. It was well said by RAPALLO, J., in the case referred to, that "the fact that the prisoner made an unauthorized use of the name of one person, if established, shows that he was morally capable of committing the same offense against another, *but does not legitimately tend to show that he did so.*"

[73] Jones v. Knowles, *ante.* In State v. Howard, 32 Vt. 380, the respondent was arrested for procuring an abortion, and the fact of the death having been proved to have occurred at his house, and other circumstances tending to establish the crime, it was held that the declarations of the deceased at the time she left home, as to her purpose in going to the respondent's house, were admissible as a part of the *res gestae.*

[1] Human v. Pettet, 5 B. & Ald. 223.

On the question of the ownership of a saloon in a certain town the statements of a party in possession of the saloon are material.[2] The declaration of one in possession of land that he was acting as agent for A. is admissible as to the title of one claiming under A.[3] Declarations of a deceased occupier of land holding under a contract for purchase, are admissible on the question of title when made while the declarant was in occupation, and when made in the course of his business of occupation, as on the premises or to the agent of the record owner.[4] So declarations made by one in possession of land, characterizing or explaining his claim to ownership, or in disparagement of his own title, are competent not only as evidence against the declarant, but against all claiming under him.[5] Declarations of an owner in possession of property as to his right of easement are admissible against a subsequent grantee.[6] Although declarations by one in possession of lands as to his ownership are admissible in his favor as part of the *res gestae*, explaining his possession, still declarations by a deceased person, when out of possession, are not competent,[7] as a claim to own certain lands,[8] or to show his object and purpose in making the sale,[9] or to show undue influence,[10] or fraud in the execution of the conveyance.[11]

[2] Lehman v. Chapel, 70 Minn. 496, 73 N. W. 402, 68 Am. St. Rep. 550.

[3] Murphy v. Dafoe (S. D., 1904), 99 N. W. 86.

[4] Walsh v. Wheelwright, 96 Maine, 174, 52 A. 649, 653.

[5] Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887; Shaffer v. Gaynor, 117 N. C. 24, 23 S. E. 156.

[6] Quick v. Cotman, 124 Iowa, 102, 99 N. W. 301.

[7] Holton v. Dunkar, 198 Ill. 407, 64 N. E. R. 1050.

[8] Dozier v. McWhorter, 117 Ga. 786, 45 S. E. 61.

Statements by a grantor after the delivery of a deed, to the effect that he is the owner of the land are not admissible to overthrow the presumption that the deed was delivered as of its date. Leonard v. Fleming (N. D., 1905), 102 N. W. 308.

[9] Burg v. Rivera, 105 La. 144, 29 So. 482.

[10] Adair v. Craig, 135 Ala. 332, 33 So. 902.

[11] Where a conveyance is assailed as fraudulent the declarations of the vendor after the conveyance admitting his fraudulent intent are admissible as part of the *res gestae* if he is still in actual possession of the property, and though he is not in possession of the property his declarations as to the intent with which he made the conveyance are admissible for the purpose of showing that intent although not for the purpose of establishing the intent of the vendee in accepting the conveyance or disparaging the vendee's title to the property. But the declarations of the vendor after the conveyance are hearsay and not admissible. Kyd v. Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661. Where the validity of a mortgage is attacked by another creditor statements of the mortgagor made after the execution of the mortgage as to the good faith of the transaction are not admissible against the mortgagee unless the mortgagee is shown to be a party to or cognizant of the fraud. Meyer v. Munroe (Idaho, 1903), 71 Pac. 969.

In a recent case the Supreme Court of Maine draws a distinction between declarations effecting the validity of the record title and declarations as to matters which must be proved by parol. The court holds that as to boundaries, rights by prescription and the like declarations, by one in possession, may bind his successors in title but not as to the validity and authenticity of the deed under which he holds.[12] Declarations enlarging the interest of the possessor are inadmissible as self-serving declarations unless the possessor claims title by adverse possession. In the latter case, where the owner does not rely upon a deed for his title, he must prove that his possession was under a claim of right and so such declarations are really evidence tending to prove one of the elements to title necessary to be proved in cases where title by limitation is relied on.[13] Declarations by former owners of land are not admissible against their grantees, as to accretions, for the reason that an accretion is determinable solely by reference to the fact of accretion, and not by an assertion of a claim of ownership.[14]

In case of declarations brought forward to qualify either temporary or continuous acts of possession, we are first to be satisfied, *prima facie,* at least, that there is a possession. This may appear by actual occupancy, inclosures, partial occupancy under a deed or contract, which carries out a constructive possession commensurate with its terms of local description, acts of ownership, etc., and an act, which would be deemed a very slight indication of possession and consequent ownership, especially in the unsettled parts of this country, will let in proof of declarations. Under this general doctrine it has been held that the declarations made by the warrantor in a deed, while in possession, going to show in what character and with what intent he entered and continued his possession, are admissible in favor of the title derived from him.[15] And on a question of settlement, one party having given in evidence long adverse possession of land by the father of the paupers, to make out that he had a settlement as a freeholder, it was held

[12] Phillips v. Laughlin, 99 Me. 26, 58 A. 64.

[13] Swope v. Ward, 185 Mo. 316, 84 S. W. 895. Where a son claims land by adverse possession the evidence of declarations of his deceased father that he had given the land to his son is incompetent to show possession in the son. Butler v. Butler, 133 Ala. 377, 32 So. 579.

[14] Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 486, 55 N. E. 184, 72 Am. St. Rep. 269.

[15] Youngs v. Vredenburgh, 1 John. (N. Y.) 158.

that the other party might show the father's declarations that he held merely under a contract for a deed, and had no title.[16]

In this class of cases, it has been made a question whether, after a *prima facie* right has been established by proof of an apparent adverse possession for a sufficient length of time to confer the title, evidence of the possessor's declarations going to cut down such title, were not inadmissible as coming within the Statute of Frauds.

The general doctrine that the declarations of a tenant in possession of land are admissible as part of the *res gestae,* for the purposes explained *supra,* has seldom been denied. A few cases have, apparently through inadvertence, gone the other way; but they have generally been afterwards given up by the very courts in which they were decided. In one case, the defendant in ejectment, claiming that certain tenants in possession held under him, offered to show their acknowledgments to that effect, which was

[16] West Cambridge v. Lexington, 2 Pick. (Mass.) 536.

Thus, in trespass, *quare clausum fregit,* it appeared that the parties owned adjoining lots, and the defendant gave evidence of a possession for thirty years, according to a crooked fence between them, the plaintiff straightened the fence, but the defendant tore the straight fence down. The palintiff offered to prove acts and declarations of the defendant since the expiration of the thirty years, showing that the old fence was built for mutual accommodation, without any view to title, and that the occupation was not adverse. The court said: "It is urged that a complete possessory title was obtained up to the line of the old fence, and that all evidence of acts or declarations, which took place afterward, are irrelevant and inadmissible to prove the character of the previous possession. If the premises are well founded, the argument is sound, and the conclusion logical. But the very question was as to the nature and character of that antecedent possession; and the acts and declarations of the parties owning the estates, made after thirty years, which had a tendency to show their motives and views during the thirty years, were proper to show the nature of the occupancy, and rebut the inference which would otherwise follow from the act of possession. Surely, if a written agreement had been produced showing that the defendant was allowed to maintain a crooked fence until the plaintiff should choose to have one back upon the true divisional line, it would defeat all claim to the land in dispute on account of the thirty years' possession. Confessions of the party in possession, claiming under that title, his acts and declarations having a tendency to show such arrangement and understanding, are equally competent evidence." Church v. Burghardt, 8 Pick. (Mass.) 327. In a similar case, in the state of New York, where the possession exceeded twenty-five years, and appeared to have been adverse, the mere declarations of the defendant that the line should have been a straight one, without any express admission showing that his possession had not been adverse, was held not admissible, or rather, not sufficient to entitle the plaintiff to the straight fence which they had built between the two extremities where the defendant said the fence should have run. Styvesant v. Tompkins, 9 John. (N. Y.) 61.

denied as hearsay, without apparently adverting to the question whether these acknowledgments might not be considered a part of the *res gestae*.[17] That they might, was afterwards conceded by the same court in another case, where the usual distinction between being in and out of possession is taken.[18]

It is well settled, however, that the tenant's declarations can in no case be received to shake a clear documental title derived to himself from the owner,[19] or if by parol, to show title in another which could only arise documentally. Either would be a plain violation of the Statute of Frauds.[20]

It is hardly necessary to observe that hearsay making a part of the *res gestae*, as well as all other declarations, in order to their being competent, *must not only relate to such facts as are susceptible of oral proof, but must also, like other evidence, be relevant to the matter in hand, must bear upon the point of inquiry, and come under subordination to other general rules which govern in the admission of testimony.* All questions of evidence must be considered in reference to the particular circumstances under which it is offered.[21] So, also, under similar qualifications, the declarations of persons accompanying their acts of forbearance to take possession, may be given in evidence.

The declaration of a tenant in possession is constantly received

[17] Calvett v. Fitzgerald, Litt. Sel. Cas. (Ky.) 388.

[18] May v. Jones, 4 Litt. (Ky.) 21.

[19] Reading v. Weston, 7 Conn. 143.

[20] Burr v. Sherman, 6 John. (N. Y.) 19.

[21] Human v. Pettett, *ante*. The plaintiff claimed a right to the exclusive felling and converting of trees in a certain belt of wood surrounded by tenants, he founding the right on long usage, and sought from this to have a grant or reservation presumed by the jury; and he was allowed to give in evidence the declarations that such was his right, made by the surrounding tenants. It was objected that this was hearsay, but answered that it was a part of the *res gestae;* for it was accompanied with forbearance by the various tenants who made the declarations, and their landlords, to exercise their right themselves, and leaving the whole to the plaintiff. Stanley v. White, 14 East 332. In a writ of entry the demandant claimed the premises as part of a mill privilege granted to Ham; and to show that it was within the grant, proved grants from Ham to several persons, of land which they took possession of as the mill privilege, and built a mill. The defendant claimed that the premises in question did not come within the grant to Ham, and was allowed to prove that when the mill built by the grantees of Ham was to be rebuilt, some of the grantees refused to join in the rebuilding, saying it stood on Allen's land, under whom the defendant now claimed. The court say their declarations were admissible as a part of the *res gestae*. The mere act of abandoning was equivocal as to the motive. The declarations removed the doubt, and were admissible to qualify the act, and in that sense made a part of it. Down v. Lyman, 3 N. H. 486.

as to whom he held under; not as evidence of title, but as evidence of possession, and the character of the possession.[22]

Sec. 139. Spontaneity of the Acts and Declarations Essential; What is.

As has previously been stated, to make acts or declarations a part of the *res gestae,* they must be contemporaneous with the main fact, but in order *to be contemporaneous* they are not required to be *precisely* concurrent in point of time. If the declarations spring out of the transaction—if they elucidate it—if they are voluntary and spontaneous, and *if they are made at a time so near to it, as reasonably to preclude the idea of deliberate design,* they are then to be regarded as contemporaneous. The reason for this rule is apparent. That which properly is admissible as a part of the *res gestae* is admissible *for* as well as *against* the party making the declaration or doing the acts claimed to form a part of the transaction, and nothing can properly be permitted, which is not so intimately blended with the transaction itself as to wholly preclude the idea that the party was seeking to make evidence for himself.[1]

In reference to acts or declarations forming a part of the *res gestae,* it must be remembered that they are admissible *for* as well as *against* a party; hence it is that courts have exercised extreme caution not to admit such acts or declarations as arise so long after the transaction to which they relate, that an opportunity is given for deliberate design in manufacturing evidence; and the fact that the declaration is against the interest of the person making it has no bearing in determining the question. If they are fairly detached from the original transaction so as not to be the spontaneous product of it, they are no part of the *res gestae.*

It is not possible to give a general rule applicable to all cases. The question of the admissibility of such evidence must necessarily depend upon the peculiar facts and circumstances of each case, and rests largely in the discretion of the court. Indeed, there is no one branch of the law of evidence that calls for the exercise of a keener discretion, or more sound judgment, than this. To

[22] Babb v. Clemson, 10 S. & R. (Penn.) 419; Willies v. Farley, 3 C. & P. 395; Guidry v. Grivot, 2 Mart. (La.) 13; Martin v. Reeves, 3 id. 22. And see Highlander v. Fluke, 5 id. 442.

[1] Mitchum v. State, 11 Ga. 278; State v. Garrund, 5 Oreg. 216.

group the declarations, acts and circumstances attendant upon the principal transaction and determine whether they are natural or artificial, *mala fide* or *bona fide,* is a matter calling into exercise the best faculties of a judicial mind. Instances can be given showing when such evidence has been received, and when it has been rejected; but they furnish no test for another case. Yet the *real* test generally applicable is simply whether the evidence sought to be admitted is of acts, declarations or circumstances so immediately connected with the fact in issue as to be a part of it, and whether they are so far the natural, voluntary, and spontaneous result of it, and are so intimately connected with it in point of time, that they may be said to spring from it, and explain the real nature, character or extent of the transaction itself. It is not essential that they should have occurred at the *precise time* of the transaction itself, but they must have occurred at such a time, and in such a manner, and must be so closely allied thereto, as really to form a part of it.[2] The rule undoubtedly is, that to constitute declarations a part of the *res gestae,* they must be made at the time when the act was done to which they relate and which they are considered as characterizing, and must so harmonize as to be obviously a part of the transaction.[3] Nor must they be narratives of past occurrences, but concomitant with the principal act, and so connected with it as to be regarded as the result and consequence, or as a part of the act itself, and presumed to have been induced by the motive which led to its commission.[4] As was said in the last case cited, they must be contemporaneous with the main fact to which they relate. In fact they must directly relate to the transaction, or be proved as so intimately connected with it and near to it in point of time, that it is mani-

[2] Meek v. Perry, 36 Miss. 190; Fifield v. Richardson, 34 Vt. 410; Tompkins v. Reynolds, 17 Ala. 109; Kearney v. Farrell, 28 Conn. 317; Rutland v. Hathorn, 36 Ga. 380; Riggs v. State, 6 Cald. (Tenn.) 517. An entry made by a banker or merchant in his account book, at the time of the transaction, and in the presence of all the parties, is part of the *res gestae;* and the book is admissible in evidence to show it, and to corroborate the memory of witnesses. So held, in an action on a check where the issue was whether the money called for by the checks had been paid in settlement or not. Reviere v. Powell, 61 Ga. 30. Generally declarations offered merely to strengthen proof of the existence of a fact are not admissible as a part of the *res gestae.* Corder v. Talbot, 14 W. Va. 277.

[3] Moore v. Meacham, 10 N. Y. 210; Enos v. Tuttle, 3 Conn. 250; Rockwell v. Taylor, 41 id. 56.

[4] People v. Davis, 56 N. Y. 95; Luby v. H. R. R. Co., 17 id. 131; Ins. Co. v. Mosley, 8 Wall. (U. S.) 405.

fest that they emanate from and constitute a component part of the same. In other words, the relation between the principal fact, and the declarations or acts sought to be established as a part of the *res gestae,* must be so close that it may be said that the declarations or acts are the declarations and acts of the transaction itself.[5] Declarations of this character are treated as so nearly akin to the principal act itself and so essentially a part of it, that the character of the person making them cannot be inquired into.

Thus, where a conductor of a freight train rushes to a brakeman in excitement as the train is crossing a bridge and says, "My God! go back and see if you can find Leach. The bridge knocked him off," this statement is admissible as part of the *res gestae.* The declarations were the outgrowth of the occurrence and the instinctive and natural outburst of expression explaining what had happened to Leach.[6] Where the time when a step of a car was let down was in issue an exclamation of the plaintiff after she fell, "Yes; let the step down after I fall," is is admissible as part of the *res gestae.* It was made immediately after the accident with reference to the cause of the fall, without opportunity for premeditation.[7] Statements by the plaintiff while walking home after being bitten by a dog are not part of the *res gestae.*[8] Statements of the driver of a cab, made immediately after an accident, that it was his fault, are purely narrative and not part of the *res gestae.*[9]

[5] MILLER, J., in Greenfield v. People, 85 N. Y. 75.

[6] Leach v. Oregon Short Line R. Co., (Utah, 1905,) 81 Pac. 90.

[7] Hutcheis v. Cedar Rapids & M. C. Ry. Co., (Iowa, 1905), 103 N. W. 779.

[8] Austin v. Bartlett, 178 N. Y. 310, 70 N. E. R. 855.

[9] Springfield Consol. Ry. Co. v. Puntenney, 200 Ill. 9, 65 N. E. R. 442. Thus, where A. and B. were jointly indicted for stealing a hog, upon a severance A. was convicted. Upon B.'s trial, he offered to prove, by a competent witness, that A., in the presence of the witness, asked B. to go with A. and get his hog, the inference being that B. supposed the hog to belong to A. The testimony was rejected on the ground that, A. having been convicted of an infamous crime, his statements were inadmissible. It was held that the evidence was of the *res gestae* and was competent, *and that A.'s infamy had nothing to do with it.* State v. Dellwood, 33 La. An. 1229. Nor is it of any consequence that the party making them would not be a competent witness upon the trial.

Thus in a Missouri case, Brownell v. Pacific, etc., R. R. Co., 49 Mo. 239, in an action brought by a widow for damages resulting from killing her husband, it was held that he being injured and almost *instantly* killed, his declarations as to the manner in which the accident happened were proper evidence as a part of the *res gestae;* but if he had lingered for such a time that the declarations could fairly have been said to have been *detached*

A statement by a party injured five or ten minutes after he has been run over by a train and while he is lying on the ground

from the accident, they would not have been admissible, (Stiles v. Danville, 42 Vt. 282,) and the question as to whether such a space of time has elapsed, is one which depends entirely upon the circumstances of each case, *and whether a sufficient time had elapsed, during which the person making them was conscious, so that an opportunity for fabricating a declaration has existed.* But the doctrine of this case has been seriously questioned, and HENRY, J., in Adams v. Hannibal, etc., R. R. Co., 74 Mo. 553, says of it, that "it has never been satisfactory to the bar or bench of this state;" and in the case last cited, a declaration made by *trainmen* immediately after the accident, "if you had stopped the train when I told you, you would not have killed him," was held inadmissible, HENRY, J., saying: "But few questions of more difficulty are submitted for determination, than those in regard to the admissibility of statements as part of the *res gestae.* The general principles on the subject are well settled, and if they had been uniformly adhered to in the adjudicated cases, the conflict in the decisions would have been avoided. The declarations of an agent are admissible as evidence against his principal, only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry in the suit in which they are offered. They are then admitted as 'verbal acts,' and part of the *res gestae.* What he may have said before the transaction is entered into, or after its completion, as explanatory, is no more admissible than if made by a stranger. Ladd v. Couzins, 35 Mo. 516; McDermott v. H. & St. Jo. R. R. Co., 73 Mo. 516; 39 Am. Rep. 526. Anything in the nature of narrative is to be carefully excluded. Bacon v. Charlton, 7 Cush. (Mass.) 586." And in Lund v. Tyngsborough, 9 id. 42, the same court said: "There must be a main or principal fact, or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it." In Luby v. Hudson R. R. R. Co., 17 N. Y. 133, the Court of Appeals observes: "The declarations of an agent or servant do not in general bind the principal. Where his act will bind, his statements and admissions, respecting the subject-matter of those acts, will also bind the principal, if made at the same time and so that they constitute a part of the *res gestae.* To be admissible, they must be in the nature of original, and not of hearsay evidence; they must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time." These general principles are recognized by all the cases on the subject, and the conflict between them has arisen in the application of the principles to the facts of the particular case.

"The observations above quoted from the opinion of the New York Court of Appeals were made in a case strongly resembling the case at bar. The defendant was sued for negligently running a railroad car, drawn by horses, against the plaintiff, in one of the streets of the city of New York. A police officer was allowed to testify that he arrested the driver directly after the accident, the citizens having stopped the car, and the driver having got outside the crowd which had gathered, and on being arrested assigned as a reason why he did not stop the car that the brakes were out of order. The Court of Appeals held it error to admit the testimony, and observed that "the alleged wrong was complete, and the driver when he made the statement was only endeavoring to account for what he had done. He was manifestly excusing himself and throwing the blame on his principal." Here the servant who remarked to his fellow-servant: "If you had stopped the train when I told you, you would not have killed him," was only en-

where he fell is admissible as part of the *res gestae*. The court say that "it was a spontaneous and impulsive statement of fact,

deavoring to exculpate himself and throw the blame on his fellow-servant, and neither his remark nor the reply to it by the other was made in the prosecution of the business of their employer, nor did they immediately precede or accompany the act which led to the catastrophe, or constitute any part of that act, but if admissible at all, would only go to show another fact, and were not of themselves facts to be proved as "verbal acts." They were only intended to prove another fact.

"The cases of Insurance Co. v. Mosley, 8 Wall. (U. S. 397; Comm. v. McPike, 3 Cush. (Mass.) 181, and Brownell v. Mo. Pac. R'y Co., 47 Mo. 243, relied upon by respondent's counsel, were not cases in which the declarations of agents were introduced as evidence, but the declarations offered and received were made by the persons injured, or by persons laboring under some disease, and the statements related to the cause of, or to the persons who had inflicted the injury, or to the symptoms and suffering of the invalid. It may be observed in the case of the Insurance Co. v. Mosley that MR. JUSTICE CLIFFORD delivered a very able dissenting opinion, concurred in by JUSTICE NELSON. The case of Comm. v. McPike has by more recent decisions of the Supreme Court of Massachusetts been questioned and qualified, if not overruled. See cases *supra*. And the case of Brownell v. Pac. R'y Co. has never been satisfactory to the bar or bench of this state. The case of Comm. v. Hackett, 2 Allen 137, is distinguishable from Brownell v. Pac. R'y Co., and Comm. v. McPike, *ante*. The facts of that case were that Gillen was stabbed in the night-time by one who immediately ran away, and the evidence offered was that Gillen at the moment he was stabbed cried out: "I'm stabbed," and a witness for the commonwealth testified that he heard the exclamation and at once went to Gillen and reached him within twenty seconds after the exclamation, and was asked: "When you got to Gillen, what did he say?" His answer was: 'He said, I'm stabbed; I'm gone; Dan Hackett has stabbed me.'" The Supreme Court said: "If it was a narrative statement wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the presence of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and *who went to him after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted.*" That portion of the opinion which we have italicized indicates the precise ground upon which the evidence was held admissible.

"Strictly applying the principles above announced, and "it is dangerous to open the door to the declarations of agents beyond what the cases have already done," was the evidence offered in the case at bar admissible? Were the declarations connected with the calamity as a cause or concomitant? Were they contemporary with the principal transaction and illustrative of its character, or merely a subsequent narrative of how it occurred, or an explanation of how it might have been avoided? If the latter, as we think, they were wholly inadmissible, and the court erred in permitting the evidence to go to the jury.

"It is not to be denied that some of the authorities cited by respondent's counsel, and others not cited, sustain his position. With few exceptions they are not cases however in which the question of agency is involved, but cases in which the declarations offered were those of persons injured, as to the causes of, or to the persons who inflicted the injuries, and while there may be circumstances which would warrant a less rigorous application of the principle, in such cases we are satisfied

while the boy was suffering intense and excruciating pain and under the excitement of the accident, where the natural prompt-

that a strict adherence to principle is the better course when it is sought to charge a master for the acts of his servant; and where there is such conflict of authority on a subject, we are inclined to be guided by principle rather than follow adjudications which have departed from it, in the apparent necessity for a departure in a given case. If in the present instance the train could have been stopped after deceased was discovered on the trestle by defendant's servants, that fact can be proved by legitimate testimony. The servants who made the declarations offered in evidence are competent witnesses for plaintiff to prove that her husband was seen on the trestle by the servants managing the train, and that the train could have been stopped before it reached him. It is no answer to this that plaintiff could not rely upon them because they were in defendant's employment. We are not to assume, in order to admit incompetent evidence, that the only person to whom the fact to be proved is known would commit perjury. If plaintiff cannot prove by competent testimony a fact essential to her recovery, we cannot establish a rule in her favor, which in a hundred other cases would probably lead to manifest injustice.

But in O'Connor v. Chicago, Milwaukee & St. Paul R. R. Co., 27 Minn. 166, it was held that in case of an accident by a railroad train running upon and injuring horses on the track, what was said by the engineer to the conductor of the train *immediately after the accident and after the train had stopped, and while they were examining to ascertain what mischief had been done*, indicating where he first saw the horses on the tract, there not appearing anything but the occurrence to cause or procure the statement, may be proved by the plaintiff as part of the *res gestae*. The court said: "To make declarations of an agent evidence against his principal they must not only have been made while he was engaged in the business of the principal, but they must be a part of the transaction out of which the controversy arises. It is not enough that they refer to or narrate the transaction after it is past; they must be so connected in time and circumstances with the principal fact as to be a part of it. When declarations of an agent or of a party himself are so closely connected with the principal fact as to be a part of the *res gestae*, is often a very nice question to determine. There are on the point many decisions which appear difficult to reconcile with each other." This ruling is supported by the following cases: Where the action was for injury from a train of cars running over plaintiff's wagon and horses, driven by his servant, it was held the defendant might prove a conversation with the servant at the time of the accident and relative to it. T. & W. Ry. Co. v. Goddard, 25 Ind. 185. In an action against a railroad company for damages, caused by delay in the carriage of cattle, the statements relating to the delay of the conductor, made while he had control of the train in which the cattle were, were held part of the *res gestae*. Sisson v. C. & T. R. Co., 14 Mich. 489. In an action against a railroad company for wrongful expulsion from one of its trains, a conversation had immediately after the expulsion, and serving to illustrate its character, between plaintiff and the offending brakeman, was held part of the *res gestae*. Bass v. C. & N. W. Ry. Co., 42 Wis. 654, S. C. 24 Am. Rep. 437. The accident being the running of a railroad train against a peddler's wagon, and the destruction of his goods, the trial court admitted evidence of what was said at the time of the accident, by the engineer in charge of the train, as to negligence in running it. This was held no error by the Supreme Court, which said: "We cannot say that the declaration of the engineer was no part of the *res gestae*. It was made

ing would be to speak the truth."[10] But declarations made by a plaintiff while lying on the ground one minute after his leg had

at the time of the accident, in view of the goods strewn along the road by the breaking of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations made upon the spot at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself." Hanover R. Co. v. Coyle, 55 Penn. St. 396. In Johnson v. State, 65 Ga. 94, on trial of J. for assault with intent to murder F., F.'s exclamation, "Oh, Julia," uttered, though half unconsciously, so soon as she, F., was found on the day of the assault, at the moment of the restoration of sensibility.—was held to be part of the *res gestae*. In an action for injuries to a person by being thrown into a ditch, evidence of what he said while being helped out was held not to be a part of the *res gestae*, but an account of a *past transaction*. Cleveland R. R. Co. v. Mara, 26 Ohio St. 185. So in another case fifteen minutes. Jackson v. State, 52 Ala. 305, thirty minutes, Denton v. State, 1 Swan (Tenn.) 279; Kinnard v. Burton, 25 Me. 39, two hours, Rutherford v. Com., 13 Bush (Ky.) 608, two days, State v. Dominique, 80 Mo. 585, one day, State v. Ware, 62 Mo. 597; Fourday & Harmon v. State, 3 Tex. App. 51, between the happening of an event and the declaration, was held too long to admit of it being regarded as a part of the *res gestae*. Thus, in an action for being run over at a railroad crossing, statements made by the plaintiff's driver a half hour after the accident, as to the reason he did not see the train, were held not to be a part of the *res gestae*. Pittsburgh, etc., R. R. Co. v. Wright, 80 Ind. 182. In an action against a railroad company for injuries from the blowing of the whistle frightening the plaintiff's horse, what he said *soon afterwards* as to the engineer's shaking his fist at him, was held not to be part of the *res gestae*. So also, as to what the engineer said on arriving at the next station, indicating malice. Newsom v. Georgia R. R. Co., 66 Ga. 57. A remark by the engineer of the train which ran over plaintiff, made in plaintiff's presence two or three hours after the accident, to the effect that he did not see him until struck by the locomotive, is not admissible. Travis v. Louisville & Nashville R. R. Co., 9 Lea (Tenn.) 231. Where a boy, who had driven against a foot-passenger on the street, immediately stopped his horse, and came back and said he did not mean to, held a part of the *res gestae*. Cleveland v. Newsom, 45 Mich. 62. A declaration made some months after a mine was located, and forming no part of the act of location, was held inadmissible as part of the *res gestae*. Kramer v. Settle, 1 Idaho, N. S. 485. Admissions of a conductor, made some days after a passenger fell off from his train, that he kicked him off, are not part of the *res gestae*. Moore v. Chicago, St. Louis, etc., R. R. Co., 59 Miss. 243. But from five to ten minutes was held not to be such a lapse of time as would necessarily prevent it from being so regarded, O'Shields v. State, 55 Ga. 696; but in another case a declaration made by a party from three to five minutes after an assault upon him, was held too remote. State v. Pomeroy, 25 Kan. 349. So in Hall v. State, 48 Ga. 607, a declaration made from ten to twelve minutes after. So in a Wisconsin case, Mutcher v. Pierce, 57 Wis. 231; 35 Am. Rep. 776, the declarations of a person injured by a pistol shot, made after his wound was dressed, and he had taken his seat in a carriage to be taken home, were held not to be admissible.

[10] Dixon v. Northern Pacific Ry. Co., (Wash., 1905), 79 Pac. 943.

"All declarations or exclamations uttered by the parties to a transaction, and which are contemporaneous with and accompany it, and are calculated to throw light upon the motives and intention of the par-

been cut off by a railroad train, while he was trying to steal a ride, as to the cause of his accident, may be excluded in the discretion of the trial judge, as they may not have been spontaneous, but rather an attempt to shift the blame.[11] A statement by a party run over by a railroad train as he lay on the ground some one-half hour after the accident, as to the reason why he attempted to alight from the moving train, is not admissible as part of the *res gestae*.[12] Where a switchman is run over and some four or five minutes afterwards says that he desires to make a statement, and he waits before making it for the arrival of another person, the statement then made lacks spontaneity and is inadmissible as part of the *res gestae*.[13] Illustrations of this character might be multiplied indefinitely, but after all, they would afford no sure test in a given case, as to what is in fact a part of the *res gestae*. The real test is, *whether the principal act and the declarations or acts are detached from each other by such a lapse of time as to make it possible for the parties to speak or act from deliberate design, rather than from instinctive impulse or the natural promptings of the mind*.[14]

ties to it, are clearly admissible as parts of the *res gestae*. Very respectable authorities restrict the doctrine of *res gestae* within the limits indicated by the foregoing definition, and exclude all declarations which are a narrative of past occurrences. This is a convenient and salutary rule, and probably the more logical one. Another rule applied in many of the American courts at least, is to admit as parts of the *res gestae* not only such declarations as accompany the transaction, but also such as are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design." So statements by one lying on the ground just after he had been run over by a train as to the cause of his accident are admissible as part of the *res gestae*. International and Great Northern Ry. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; Murray v. Boston & Maine R., 72 N. H. 32, 54 A. 289, 291.

[11] Pledger v. Chicago B. & Q. R. R. Co., (Neb., 1903), 95 N. W. 1057.

[12] White v. Southern Ry. Co., (Ga., 1905), 51 S. E. 411.

[13] Atchison T. & S. F. R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878.

[14] In State v. Garrand, 5 Oregon, 216, the court say to make declarations a part of the *res gestae* they must be contemporaneous with the main fact; but, in order to be contemporaneous, they are not required to be precisely concurrent in time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous.

Sec. 140. Acts and Statements After the Principal Fact.

What occurs *after* the principal act is complete, and an opportunity for fabricating an explanation thereof has set in, is no more a part of the *res gestae*, although it occurs within a very few moments after the act, than is a declaration made several days afterwards.[1] "If the declarations are a mere narration of a past occurrence, they are not admissible as *res gestae*. When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case, there can be no hard and fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made, in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction, and be the instructive, spontaneous utterances of the mind while under the active, immediate influences of the transaction; the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations."[2] But in an action for the purchase price of certain

[1] Sorenson v. Dundas, 42 Wis. 462. That declarations made by a party after the transaction is ended, or an injury is received, so far detached therefrom in point of time as to admit of deliberate design, or as to be fairly detached from the transaction to which they relate, are not regarded as a part of the *res gestae*, see Lane v. Bryant, 9 Gray (Mass.) 245; Smith v. Webb, 1 Barb. (N. Y.) 230; McAdams v. Brand, 35 Ala. 478; Osborne v. Robbins, 37 Barb. (N. Y.) 481; Simmons v. Macon, etc., R. R. Co., 28 Ga. 94; Nelson v. State, 2 Swan (Tenn.) 237; Detroit, etc., R. R. Co. v. Van Steinberg, 17 Mich. 99; Com. v. Harwood, 4 Gray (Mass.) 41; State v. Jackson, 17 Mo. 544; Wilson v. Sherlock, 36 Me. 295; Stewart v. Reddett, 3 Md. 67; Cherry v. McCall, 23 a. 193; Carter v. Buchanan, 3 id. 513; People v. Graham, 21 Cal. 261; Luby v. Hudson River R. R. Co., 17 N. Y. 131; Monday v. State, 32 Ga. 672; Matteson v. N. Y., etc., R. R. Co., 35 N. Y. 487; Kinnard v. Burton, 25 Me. 39; Com. v. McPike, 3 Cush. (Mass.) 181; State v. Dominique, 30 Mo. 585. Indeed, in Friedman v. R. R. Co., 7 Phil. (Penn.) 203, it was held expressly that even the dying declarations of the deceased, as to the *cause* of his injuries, could only be given in evidence in an action for negligence. See, also, Marshall v. Chicago, etc., R. R. Co., 48 Ill. 475.

In Lambert v. The People, 29 Mich. 71, the court admitted statements made by a person who had been robbed, made to persons coming up to him within three minutes after the commission of the crime, as a part of the *res gestae*.

But if such a time had elapsed as to detach the statements, in point of time, from the transaction itself, the evidence would not have been admissible. Thus, in Hamilton v. People, 29 Mich. 171, for burning a barn, it was held that statements made by the respondent after the fire were not admissible.

[2] State v. McDaniel, 68 S. C. 304, 47 S. E. 384.

"ditchers," where the buyers denied the sale, one of the plaintiffs may show as part of the *res gestae,* an inquiry of his partner as to the financial ability of the buyer, made two hours after the defendants had ordered the "ditchers," but before the plaintiffs had ordered them of the manufacturers. "Time is not necessarily a controlling element or principle in the matter of *res gestae,* and that declarations made under circumstances to warrant the court in presuming that they grew out of the litigated issue and illustrate the true character of the transaction, and were dependent upon it, were not designedly made or devised for a self-serving purpose, are evidentiary facts and are not within the general rule applicable to hearsay testimony."[2] The burden is upon one who seeks to introduce hearsay evidence as part of the *res gestae* of a transaction to show that it is in fact part of the *res gestae,* so a statement by a husband that his wife complained, "immediately" after the accident, is insufficient as the word immediately is too indefinite acording to time.[4]

Where one is shot and others in the house rush to his assistance immediately when he cries, "Charlie has shot me to death," this declaration is admissible as part of the *res gestae.* Under the circumstances the declarant could not have formed a deliberate design to speak falsely.[5] A statement by a motorman alighting from his car on striking a cow, "There, that is running without a headlight," is admissible as part of the *res gestae.*[6] However, statements by a conductor of a train immediately after he has put a man off are not admissible as part of the *res gestae.*[7] So statements made by a conductor of a train immediately after an accident, may be excluded as not being part of the *res gestae,* and not being within the scope of the conductor's authority,[8] and on the other hand a statement by an engineer immediately after an accident may be admissible as part of the *res gestae.*[9]

In an action for damage claimed to have been caused by a fire set by the defendant's harvesting engine a statement of the de-

[2] Coffin v. Brodbury, 3 Idaho 770, 35 Pac. 715, 95 Am. State Rep. 37.

[4] Pool v. Warren County, (Ga., 1905), 51 S. E. 328.

[5] State v. Arnold, 47 S. C. 9, 58 Am. State Rep. 867, 24 S. E. 926.

[6] Ensley v. Detroit United Ry., 134 Mich. 195, 96 N. W. 34.

[7] Barker v. St. Louis I. M. & S. Ry. Co., 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646.

[8] Nelson v. Georgia C. & N. Railway, 120 S. C. 312, 47 S. E. 722; Redman v. Metropolitan St. Ry. Co., 185 Mo. 1, 84 S. W. 26.

[9] Hermes v. Chicago, etc., Ry. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69.

fendant's foreman the day after the fire, "I will never take the engine back into the field, unless she is fixed so that she will not throw sparks," is not part of the *res gestae.*[9a]

Proximity of the declaration in point of time with the act is not of itself sufficient to make it part of the *res gestae,* so where a railroad guard slammed a door on the plaintiff and on her protesting made an insulting remark to her, this remark is not admissible of the *res gestae,* as it was not connected with the act of shutting the door, which was complete before the remark was made.[10] A statement of a driver of a team, made three or four minutes after the accident, telling how the accident happened, is not admissible as part of the *res gestae.*[11] Declarations made by a railroad foreman, about half an hour after an accident, are not part of the *res gestae,* as the time which had elapsed was sufficient to convert them into a mere narrative of a past occurrence.[12] A statement by an eye witness to a murder, an hour after it had taken place, is inadmissible as part of the *res gestae,*[13] and a statement by a witness at the coroner's inquest five and one-half hours after the accident, is not admissible as part of the *res gestae.*[14] But declarations in a trial for homicide, made by a victim, may be admissible as *res gestae* if voluntary and spontaneous, although made an hour after the crime, where they are the first words the victim has spoken since the crime.[15]

Statements by a plaintiff in an action for slander, "Why did he tell such an awful lie? It is worse than death. My good name is all I have," are not admissible as evidence of the plaintiff's feelings at the time, but are mere statements of a past occurrence.[16] A statement by a fellow-servant of an injured employee, after the accident, as to the cause of the injury is inadmissible.[17] Statements made by a railroad telegraph operator immediately after an accident are not admissible as part of the *res gestae.*[18] Also,

[9a] Quint v. Dumond, (Cal., 1905), 82 P. 310.

[10] Butler v. Manhattan Ry. Co., 143 N. Y. 417, 38 N. E. 454, 42 Am. St. Rep. 738.

[11] Barnes v. Rumford, 96 Maine 315, 52 A. 844.

[12] Briggs v. East Broad Top R. & Coal Co., 206 Penn. 564, 56 A. 36.

[13] Elder v. State, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220.

[14] Purcell v. Chicago & North Western Ry. Co., 109 Iowa 628, 80 N. W. 682, 77 Am. St. Rep. 557.

[15] Lewis v. State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720.

[16] Kidder v. Bacon, 74 Vt. 263, 52 A. 322.

[17] Kamp v. Coxe Bros. & Co., (Wis., 1904), 99 N. W. 266.

[18] Tiborsky v. Chicago, M. & St. P. Ry. Co., (Wis., 1905), 102 N. W. 549.

in an action against a saloon keeper under a statute for causing the death of a patron by selling him liquor, the statements of the deceased while on the road from the saloon as to where he obtained the whiskey then in his possession are not part of the *res gestae*.[19] A statement by a conductor of a street car after he had gone from the place where the car stopped to the place of the accident where the plaintiff lay and had again returned to the car, is not admissible as part of the *res gestae*.[20] So, too, *the res gestae generally remains with the locus in quo and does not follow the parties after the principal act is complete*.[21] Where an engineer of a railroad train runs his train back to the scene of the accident immediately after a collision with a wagon, his conversation with a bystander on reaching the scene of the collision is inadmissible as part of the *res gestae*. Declarations of strangers in order to be admissible should be in the nature of verbal acts illustrative and as a part of the transactions in question.[22] Thus, if a party is injured by reason of a defect in a highway, declarations made by him at the place of the injury, immediately upon the happening of the accident, are a part of the *res gestae;* but after the party has gone away from the *locus in quo,* however soon after the injury, his declarations cease to be a part of the *res gestae,* so far as the *cause* of the accident is concerned. In the Wisconsin case,[23] cited in the last note, statements made by the driver of the carriage, after he returned to the stable with the horses and carriage, as to the cause of the injury, were held not admissible, the court saying: "The *res gestae* of this accident did not go with the team to the livery stable, but remained in the *locus in quo* with the injured woman; and the declarations of the driver to the liveryman were a subsequent narrative of the *res gestae.*" In another Wisconsin case,[24] which was an action for personal injuries resulting from a pistol shot wound inflicted upon the plaintiff's minor son, it was held that declarations made by the son after his wound was dressed, and he had been placed in a carriage

[19] Horst v. Lewis, (Neb., 1905), 103 N. W. 460.

[20] Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243.

[21] Prideaux v. Mineral Point, 43 Wis. 513. In State v. Seymour, 1 Houst. Cr. Cas. (Del.) 508, a declaration made by the respondent after he had gone two hundred yards from the place of shooting, that it was accidental, was held not to be a part of the *res gestae*.

[22] Gosa v. Southern Railway, 67 S. C. 347, 45 S. E. 810.

[23] Prideaux v. Mineral Point, *ante*.

[24] Mutcher v. Pierce, 49 Wis. 231.

to be taken home, as to the *cause* of the injury, were not admissible as a part of the *res gestae*. In a New York case,[25] however, such declarations as to the *nature* of the injury, and its extent, made by the injured person, were held to be admissible where the injury resulted from his being thrown from a sleigh in consequence of a defect in a highway, *after* he had got back into the sleigh again. But the distinction between these cases is, that in the one case the declarations related to the *cause* of the injury, while in the other they related to the nature of the person's injury, which with him was a present and continuing fact.[26]

Sec. 141. Declarations of Conspirators, when Evidence Against Co-conspirators.

A well-known example of evidence admissible as part of the *res gestae* is supplied in the instance of prosecutions which involve a charge of conspiracy. It is an established rule, that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party;[1] it follows, therefore, that any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and so being of the *res gestae*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appears that they were used in the furtherance of a common design.[2] So in a civil case.[3]

[25] Powers v. West Troy, 25 Hun (N. Y.) 561.

[26] Declarations made to a physician of bodily feelings and symptoms of pregnancy *at the time of examination* are admissible as a part of the facts on which his opinion is based. But other unconnected assertions in the same conversation charging a person with criminal acts, to procure a miscarriage, are not admissible. State v. Gedicke, 43 N. J. L. 86.

[1] Charge of BAYLEY, J., in Watson's Case, 32 How. St. Tr. 7. See, also, Brandreth's Case, 32 How. St. Tr. 854, 857; R. v. Salter, 5 Esp. 125; R. v. Cope, 1 Stark. 144.

[2] The conspiracy being once established, or facts having been adduced which justify the inference of a conspiracy, the acts and declarations of each conspirator made pursuant to and in furtherance of the conspiracy are competent evidence against all. It matters not in either case, when one enters into or becomes a party to the conspiracy, how prominent or inconspicuous a part he may take in the execution of the unlawful purpose or the use of the unlawful means; he is responsible to the fullest extent for all that precedes as well as all that follows in connection with the plot, whether done by himself or by one or more of his associates. The only limitation upon the rule is that what is said and done must be said and done after

Declarations of conspirators and their employees are admissible when made during the pendency of the conspiracy and germane to it,[4] although the declarations are mere narratives of the plan and are not in furtherance of it,[5] and although the declarations are of those not parties to the record,[6] and a letter written by one of the conspirators may be admitted, although it is not shown which one of the conspirators wrote the letter.[7]

The common design need not be first shown before the statements or declarations made by one of them, in the absence of the others, can be given in evidence against the others, but may be furnished at a later stage of the trial, and the conduct, acts and declarations of the separate parties in the planning or execution of the scheme may be shown as evidence of the common design.[8] And the common design having been proved, the declaration of one of the parties may be shown in evidence against them all.[9]

the formation of the conspiracy, and in furtherance and in pursuance thereof. Of course, what may be said or done by any one of the conspirators, after the completion of the purpose for which the conspiracy was formed, can be used only against the one saying or doing it. Standard Oil Co. v. Doyle, (Ky., 1904), 82 S. W. 271. Hardy's Case, 24 How. St. Tr. 704. What the effect of such evidence will be, must depend upon a variety of circumstances; as, whether the prisoner was attending to the conversation; whether he approved or disapproved. By Eyre, C. J., ib.; Cuyler v. McCartney, 33 Barb. 165, 171.

[3] Miller v. John, 208 Ill. 173, 70 N. E. R. 27.

[4] Lane v. Bailey, 29 Mont. 548, 75 Pac. 191.

[5] Conn. Mut. Life Ins. Co. v. Hillmon, 188 U. S. 208, 218, 23 S. Ct. 294.

[6] Clune v. United States, 159 U. S. 590, 16 S. Ct. 125. Telegrams sent by parties outside the state giving directions as to a conspiracy to interfere with the United States mails.

[7] Ramsey v. Flowers, 72 Ark. 316, 80 S. W. 147; Cohn vs. Laidel, 71 N. H. 558, 53 A. 800; *contra*, The People v. Parish, 4 Denio 153; Williamson v. Commonwealth, 4 Gratt. (Va.) 547.

[8] State v. Simmons, 4 Strobh. (S. C.) 266; Regina v. Mears, 1 Eng. Law & Eq. 581; State v. Ripley, 31 Me. 386.

[9] Glory v. State, 13 Ark. 236. It makes no difference that the person who utters the declaration is not a party to the suit which draws the conspiracy in question. Claylor v. Anthony, 6 Rand. (Va.) 285. On an information in the nature of a *quo warranto*, to avoid the election of usurping vestrymen in a religious corporation, whose election was objected to as being procured by preconcerted tumult and violence, various conversations in respect to the election among the corporators, at their meeting, and at meetings of certain members of the congregation, and at meetings of certain voluntary societies, were received in evidence in behalf of the commonwealth. And held, that it was properly put to the jury whether what they had heard was relevant, and ought to have any influence as being connected with the election. Com. v. Woolser, 3 S. & R. (Penn.) 29, 31. In case of a fraudulent combination to extort money by several persons, which probably continued on foot down to the time of the trial, it was held that the declaration of one, being part of the *res gestae*, were admissible to affect the others. Apthorpe v. Comstock, 2

The declarations of joint wrongdoers, when received to affect others, are not always confined to the narrow ground of the *res*

Paige Ch. (N. Y.) 482, 488. The plaintiff, C., holding a bill of sale of personal property, subject to the levy of an execution, the debtors in the execution, who had given the bill of sale to the plaintiff, conspired with M. to procure a sheriff's sale, in the plaintiff's absence, so as to prevent his redeeming the property; and it was sold at auction to M. In trover by C. against certain persons who claimed title through M., the declarations of one of the debtors and M., made about the time of the auction, were held admissible against the defendants, as part of the *res gestae*. Crary v. Sprague, 12 Wend. (N. Y.) 41. See Willies v. Farley, 3 C. & P., 395, where a vendor in possession after sale may, by his declarations, affect his vendee on the ground of the *res gestae*.

Where a sheriff is sued for taking property, and he defends on the ground that plaintiff's title is derived through a fraudulent assignment, the declarations of third persons not parties to the action cannot be proved without showing that they and the plaintiff acted on a common purpose to defraud creditors. Jones v. Hurlburt, 39 Barb. (N. Y.) 403.

In an early English case, R. v. Stone, 6 T. R. 527, the prisoner was indicted for treason, and was charged with conspiring, together with a person of the name of Jackson, to collect and communicate intelligence to the French government. After evidence had been given of a conspiracy for this purpose, a letter written by Jackson, containing treasonable information, and which had been intercepted, was received in evidence against the prisoner.

Upon the same principle, in another case, Hardy's Case, 24 How. St. Tr. 704. (The scruple of EYRE, C. J., in consequence of the letter never having reached its destination, does not appear to have any weight), a letter written by the chairman of a meeting in London to a delegate sent by that meeting into Scotland, was received in evidence: the letter containing encouragement to that delegate to proceed in the cause in which he had been engaged by the direction of the meeting in London; and that meeting being composed, amongst others, of the prisoner, the writer of the letter, and the person to whom it was adddressed. In the same case, evidence was admitted to prove that Thelwell (who was a member of the Corresponding Society with the prisoner) had brought a paper with him to a printer, and desired him to print it; the paper being considered as evidence to prove a circumstance in the conspiracy. On the same trial numerous letters were read which had been written by co-conspirators in furtherance of the common object, and tracts and other writings distributed by them were received in evidence; being in the nature of verbal acts, for which the prisoner, though not personally present when they were spoken, written or published, was nevertheless responsible. In like manner, consultations in furtherance of a conspiracy are receivable in evidence, as also letters or drafts of answers to letters, and other papers found in the possession of co-conspirators, and which the jury may not unreasonably conclude were written in prosecution of a common purpose to which the prisoner was a party, Lord Russell's Case, 9 How. St. Td. 578. In a later case, (Horne Tooke's Case, 25 How. St. Tr. 220. And see the point respecting letters found in the possession of co-conspirators in Watson's Case, *infra*), the draft of a letter intended to have been sent by Hardy, as secretary to the Corresponding Society, in answer to another letter, and which was found in Hardy's possession, was admitted. And in the same trial, another letter was admitted, which was written by the secretary of a society at Sheffield, and was addressed to the prisoner, but was found in Telwall's possession. For the same reason, declarations or writings explanatory of the nature of a common object, in which the prisoner is engaged, together with others, are receivable in evi-

gestae. In most instances, the common object being first proved, and the wrong done, admissions by one made long after the injury is complete, may be received to affect the others.

Sec. 142. Statements of Conspirators, when not Part of the Res Gestae.

But where words or writings are not acts in themselves, nor part of the *res gestae,* but a mere relation or narrative of some part of the transaction, or as to the share which other persons have had in the execution of a common design, the evidence is not within the principle above mentioned; it altogether depends on the credit of the narrator, who is not before the court, and therefore it cannot be received. So declarations by a conspirator after the object of the conspiracy is accomplished, are inadmissible against a co-conspirator.[1]

Sec. 143. Writings in Possession of Conspirators Before or After Apprehension.

It is in consequence of the distinction between writings or declarations which are a part of the transaction, and such as are in the nature of subsequent statements, but not part of the *res gestae,*

dence; provided they accompany acts done in the prosecution of such an object, arising naturally out of these acts, and not being in the nature of a subsequent statement or confession of them. Upon this principle the expressions of the mob in the Sacheverell riots, that they designed to pull down the meeting-houses, were admitted in evidence. 15 How. St. Tr. 552.

[1] State v. Rice, 49 S. C. 418, 27 S. E. 452, 61 Am. St. Rep. 816.

Thus, on the trial of Hardy for high treason, Hardy's Case, 24 How. St. Tr. 452, 475. See 32 How. St. Tr. 351; a question arose as to the admissibility of a letter written by Thelwell, and sent to a third person not connected with the conspiracy, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which society the prisoner and the writer were proved to be members. The argument in favor of the admission of the evidence was, that the letter was an act done in furtherance of the conspiracy; that the letter contained language of incitement, not merly a narrative or confession by a stranger, and that in such case "*scribere est agere.*" The objection was, that the letter contained merely a relation by the writer, that certain songs had been sung, which could not be evidence against the admissibility of the letter. "Correspondence," said EYRE, C. J., "very often makes a part of the transaction, and in that case the correspondence of one who is a party in a conspiracy would undoubtedly be evidence, that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what had been done, appears a different thing."

that the admissibility of writings often depends on the time when they are proved to have been in the possession of co-conspirators; whether it was before or after the time of the prisoner's apprehension. Thus, on the trial of Watson,[1] some papers, containing a variety of plans and lists of names, which had been found in the house of a co-conspirator, and which had a reference to the design of the conspiracy, and in furtherance of the alleged plot, were held to be admissible evidence against the prisoner. All the judges were of opinion that these papers ought to be received; inasmuch as there was in the case strong presumptive evidence that they were in the house of the co-conspirator *before* the prisoner's apprehension; for the room in which the papers were found had been locked up by one of the conspirators. And the judges distinguished the point in this case from a point cited from Hardy's case, where the papers were found, *after* the prisoner's apprehension, in the possession of persons who, possibly, might not have obtained the papers until afterwards.

The principles upon which evidence of the description above mentioned is admitted, are equally applicable to the trial of civil injuries, in the commission of which different defendants have concurred.[2] But evidence of this description is inadmissible in actions where no common motives or object can be imputed, as in actions for negligence;[3] at least it ought not to affect co-defendants where such a consequence can be avoided. And the principle upon which the declarations of associates are admitted in civil actions not less than in proceedings upon criminal charges, only applies where such declarations are strictly a part of the transaction in question.

[1] Watson's Case, 2 Stark. 140.
[2] Powell v. Hodgetts, 2 C. & P. 432; North v. Miles, 1 Camp. 389; Bowsher v. Cally 1 Camp. 391.
[3] Daniels v. Potter M. & M. 501.

CHAPTER XV.

Testimony Taken in Former Trial.

Section 144. In general.

Sec. 144. In General.

Testimony taken in a previous case in another court involving the same issues between the same parties is competent where the witness is dead and may be shown by the past testimony of one who heard the witness testify in the first suit.[1] The testimony of a witness at a previous trial is also admissible on proof of permanent absence from the State; mere absence from the State is insufficient,[2] and such testimony may be proved on showing that the witness is permanently absent from the State and that his whereabouts is unknown, even though the party had made no efforts to ascertain his whereabouts or procure his attendance.[3] Such evidence is also admissible in case of insanity and where the witness is kept away by the other party, but only in case there was a full opportunity to cross-examine the witness in the first trial when the testimony there taken is admissible,[4] although the former trial was not concluded.[5] The rule does not admit a statement which was immediately stricken out, so that the other side had no opportunity to explain it or to cross-examine as to it.[6]

[1] Persons v. Smith et al., 12 N. D. 403, 97 N. W. 551; Lange v. Klatt, 135 Mich. 262, 97 N. W. 708.

[2] State v. Banks, 106 La. 480, 31 So. 53. Evidence of the testimony of a witness at a former trial can be given in Alabama only where the witness has left the State permanently or for such an indefinite time that his return is contingent or uncertain. It has been held that evidence of a witness that he had seen a witness who had testified in a former trial three or four months before in Texas and he said he was living in Texas is insufficient as a predicate to the admission of the transcript of his evidence at a former trial. Southern Ry. Co. v. Bonner (Ala., 104), 37 So. 702. Where a witness is out of the jurisdiction his testimony taken at a former trial may be admitted. Atchison, Topeka & Santa Fe R. R. v. Osborn, 64 Kan. 187, 67 P. 547, 91 Am. St. Rep. 189 and note, page 192.

[3] McGovern v. Smith, 75 Vt. 104, 53 A. 326.

[4] U. S. v. Macomb, 5 McLean, 286.

[5] Taft v. Little, 178 N. Y. 127, 591, 70 N. E. R. 121.

[6] Young v. Valentine, 177 N. Y. 347, 69 N. E. R. 643.

Where the deposition of a witness has been taken and is in court evidence of his testimony on a former trial is admissible even though in the deposition he forgets matters to which he testified on the former trial. When failure of memory amounts to mental imbecility, a witness is as one dead or insane and as his testimony cannot then be taken his testimony on a former trial of the same issue, between the same parties, may be resorted to but not in this case.[7] The mere substance of the previous testimony is usually sufficient without giving the exact words,[8] but even a stenographic report of the testimony is inadmissible without proof of its genuineness and correctness.[9] The official stenographer who took notes of a former trial, which he has translated and written out may testify as to the accuracy of the translation and thus render it admissible in evidence.[10] Depositions taken at a coroner's inquest are mere *ex parte* statements and incompetent except for purposes of contradiction.[11]

[7] Stein v. Swensen, 46 Minn., 360, 4 N. W. 55, 24 Am. St. Rep. 234.

[8] United States v. Macomb, 5 McLean (U. S. Cir. Ct.), 286; Lime Rock Bank v. Hewett, 52 Me. 531; Clealand v Huey, 18 Ala. 343.

[9] Barksdale v. Security Ins. Co., 120 Ga. 388, 47 S. E. 943.

[10] Smith v. Scully, 66 Kan. 139, 265, 71 Pac. 249.

[11] Knights Templar Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. R. 1066; Cox v. Royal Tribe of St. Joseph, 42 Ore. 365, 71 Pac. 73. Certified notes taken by a coroner of testimony given before him are not admissible in another proceeding unless their authenticity was duly established by the oath of the coroner, where such notes were not taken under statutory requirement. Edwards v. Grimbel, 202 Penn. 30, 51 A. 357.

CHAPTER XVI.

Admissions.

SECTION 145. Admissions of parties to a suit.
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147. Weight to be given to admissions or declarations.
148. Where and how a party may discredit his admissions.
149. Parties to negotiable paper generally.
150. Admissions by an indorser.
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159. Admissions by guardians, nominal parties to the record, executors, etc.
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168. Effect of plea of general issue, etc.
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171. Admissions acted upon by others to their prejudice.
172. Admissions under oath in deeds, etc.
173. Admissions by corporate officers and agents.

Sec. 145. Admissions of Parties to a Suit.

Admissions are not, properly speaking, evidence, but are a substitute for evidence and so not subject to the considerations governing the admissibility of evidence itself. Thus the deposition of a party, technically inadmissible as such, may be introduced against him as an admission.[1] The record of a coroner's inquest attached to proofs of death made by the beneficiary or his agent under an insurance policy is admissible in evidence

[1] Profile & Flume Hotels Co. v. Bickford, 72 N. H. 73, 54 A. 699.

upon the ground that it contains admissions of the beneficiary against his interest as to the cause of death, but the coroner's inquest is not admissible when attached to proofs furnished by the company's agent.[2] The admissions or statements of a litigant against his interest made out of court or upon a former trial, relating to a material matter, may be proved without laying the foundation required for impeaching a disinterested witness by calling the admission to his attention while on the stand.[3] Where a suit is brought in behalf of an infant, his declarations against interest are admissible in evidence against him, even although his testimony is inadmissible, as he does not appreciate the nature of an oath.[4] Where a party seeks to establish that his opponent in a previous trial put forth a different claim it is permissible to prove not only that he himself averred it in testimony, but also that he procured others to support him. Affidavits or statements of third persons used by a party are evidence against him in a subsequent controversy on the ground of admissions.[5] A statement made by a defendant in an action for personal injuries to the effect that he considered himself responsible for the action which is the subject of the suit is competent evidence against him, *even though it is a statement of an opinion,* to oppose later contradictory testimony at the trial of the case.[6]

It is a well settled rule of evidence that the admissions of a party are admissible as evidence *against* him, but not in his favor,[7] except when they form a part of the *res gestae,* or where,

[2] Cox v. Royal Tribe of Joseph, 42 Ore. 365, 71 Pac. 73.

[3] Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

[4] Atchison, etc., R. R. Co. v. Potter, 60 Kan. 808, 58 P. 471, 72 Am. St. Rep. 385. *Contra,* Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. R. 1066.

[5] Bageard v. Consolidated Traction Co., 64 N. J. L. 316, 45 A. 620, 81 Am. St. Rep. 498.

[6] Shinkle v. McCullough, 116 Ky. 960, 77 S. W. 196.

[7] Jacob v. Shorey, 46 N. H. 100; Magee v. Raiguel, 64 Penn. St. 110. The declarations of a party in interest are not admissible to show the location of a disputed line, although he has since died, but they are admissible to show that he never acquiesced in another line. Evarts v. Young, 52 Vt. 329; Martin v. Williams, 18 Ala. 190; Kennedy v. Meedor, 1 S. & P. (Ala.) 220; Gordon v. Clapp, 38 Ala. 357; Hazen v. Henry, 6 Ark. 86; Rice v. Cunningham, 29 Cal. 492; North Stonington v. Stonington, 31 Conn. 412; Heard v. McKee, 26 Ga. 332; Scobey v. Armington, 5 Ind. 514; Murray v. Cone, 26 Iowa, 276; Wright v. Haddock, 7 Dana (Ky.), 253; Talbot v. Talbot, 2 J. J. Mar. (Ky.) 3; Tipper v. Commonwealth, 1 Metc. (Ky.) 6; Tucker v. Hood, 2 Bush. (Ky.), 85; Handley v. Call, 30 Me. 8; Hogan v. Hendry, 18 Md. 177; Carter v. Gregory, 8 Pick. (Mass.) 165; Jacobs v. Whitcomb, 10 Cush. (Mass.) 255; Nutting v. Page, 4 Gray (Mass.), 581; Emerson v. Lowell Gas Light Co., 6 Allen (Mass.), 146; Hogsett v.

although against his interest, they nevertheless make for him upon another collateral issue. As where he has indorsed a payment upon a note or other obligation, in those States where the debt may be renewed by part payment, his indorsement of a payment thereon is admissible in his favor to repel the statute of limitations, provided it was made at such a time and under such circumstances as to repel all idea of it having been made for the purpose of avoiding the statute.[8] But as a rule, except where they go to establish intention,[9] such admissions are only admissible *against* the party making them.[10] If, however, they accompanied

Ellis, 17 Mich. 351; Milliken v. Greer, 5 Mo. 489; Darrett v. Donnelly, 38 Mo. 492; Moore v. Sanbourn, 42 Mo. 490; Wiggin v. Plumer, 31 N. H. (11 Fost.) 251; Judd v. Brentwood, 46 N. H. 430; Smith v. Kerr, 1 Barb. (N. Y.) 155; State v. Jefferson, 6 Ired. (N. C.) L. 305; White v. Green, 5 Jones (N. C.), L. 47; Burridge v. Geauga Bank, Wright (Ohio), 688; Graham v. Hollinger, 46 Penn. St. 55; Williams v. English, 64 Ga. 546.

[8] Gibson v. Peebles, 2 McCord (S. C.), 418.

[9] Young v. Power, 41 Miss. 197; Baker v. Kelly, 41 id. 606.

[10] Brown v. Brown, 5 Ala. 508; Blaum v. Beal, 5 id. 357; James v. Stockey, 1 Wash. (U. S. C. C.) 330; Freeborn v. Smith, 2 Wall. (U. S.) 160; Buswell v. Davis, 10 N. H. 413. Declarations of a third party not at the time in possession of the property, unaccompanied by any corresponding act, are inadmissible. O'Brien v. Hilburn, 22 Tex. 616. Evidence of the declarations of a person who is competent to testify in the case is not admissible. Bank of Alabama v. M'Dade, 4 Port. (Ala.) 252; Field v. Suice, 7 Ark. 269; Williams v. Kelsey, 6 Ga. 365; Compton v. Fleming, 8 Blackf. (Ind.) 153; Flynn v. Merchants' Ins. Co., 17 La. Ann. 135; Brown v. Mooers, 6 Gray (Mass.), 451; Fanny v. State, 6 Mo. 121; Langsdorf v. Field, 86 Mo. 440; Howell v. Howell, 37 Mo. 124; Alexander v. Mahon, 11 Johns. (N. Y.) 185; Woodward v. Paine, 15 id. 493; Rowland v. Rowland, 2 Ired. (N. C.) L. 61; Persons v. Burdick, 6 Wis. 63. And the fact that a person is dead at the time of a trial, who if alive might be a witness, will not make his writings evidence any more than his unsworn declarations would be. Crump v. Starke, 23 Ark. 131. Nor is the fact that a witness was taken sick the day previous to the trial a circumstance sufficient to warrant the admission of his declarations on the ground of necessity. Gaither v. Martin, 3 Md. 146. Nor is it a good reason for admitting in evidence the declarations of a third person, not a party to the suit, that such person cannot be examined as a witness. Churchill v. Smith, 16 Vt. 560. The declarations of a person exercising authority that he possesses it can never be received as evidence of the fact of his authority. James v. Stookey, 1 Wash. 330. Nor can parties give in evidence private conversations or correspondence with each other to rebut evidence of partnership with a third person. Freeborn v. Smith, 2 Wall. (U. S.) 160. In detinue, after a demand and refusal to deliver the property has been proved by the plaintiff, the defendant may show that his refusal was qualified, but cannot be allowed to prove his own declarations at the time relative to his title to the property. Brown v. Brown, 5 Ala. 508. A party's answers to interrogatories, under the statute in aid of discoveries in common-law suits, if his adversary declines to read them, cannot be considered by the court as evidence for him for any purpose. Wells v. Bransford, 28 Ala. 200. Nor are the declarations of the defendant in execution admissible in favor of a claimant of the property levied on,

the transaction in dispute and were a part of the *res gestae*,[11] or

nor in his own behalf, unless they form a part of a conversation proven by the plaintiff in execution. They are admissible in favor of the plaintiff in execution. Brown v. Upton, 12 Ga. 505. In a Georgia case, two drovers came to an inn together; one of them told the negro hostler not to tie the horses; he did, however, tie them, and the horse of the other drover was strangled. In an action therefor against the innkeeper, the above direction was admitted in evidence. Jones v. Hill, 26 Ga. 194. Gestures are treated as acted language, and are no more admissible than declarations in favor of the party making them. Bowie v. Maddox, 29 Ga. 285. In an action against an officer for an escape on *mesne* process, the admissions of the defendant in the original suit may be proved to show a cause of action in such suit. And it is not necessary that such admissions should have been made before the escape. Hart v. Stevenson, 25 Conn. 499. But where an action is brought by a minor, through his father as next friend, the father's declarations are not admissible. Hammer v. Pierce, 5 Harr. (Del.) 304. As a general rule, the admissions or declarations of a person *not a party to the record* are not admissible in evidence even in the absence of better testimony. Ibbitson v. Brown, 5 Iowa, 532; Chastain v. Robinson, 30 Ga. 55; Berry v. Waring, 2 Har. & J. (Md.) 103; Lyman v. Gipson, 18 Pick. (Mass.) 422; Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95; Bain v. Clark, 39 Mo. 252; Forsaith v. Stickney, 16 N. H. 575; Jones v. Doe, 2 Ill. 276; McCormick v. Robb, 24 Penn. St. 44; Kottwitz v. Bagby, 16 Tex. 656. Thus the declarations of an absent subscribing witness to a deed are admissible to show that it was fraudulently obtained. Shackelford v. Purket, 1 A. K. Marsh. (Ky.) 425. And the rule admitting evidence of the declarations of a third person, made in the presence of a party and affecting his interest, is not to be extended to include declarations made before such interest was acquired or known by the party to exist. Ware v. Ware, 8 Me. 42. Declarations of one who is neither a party to the record nor a witness are incompetent for the purpose of showing that he is the real party in interest to the action. Ryan v. Merriam, 4 Allen (Mass.), 77. Evidence obtained by means of a search warrant is not to be rejected either upon the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued. State v. Flynn, 36 N. H. 64. The rule is inflexible that one man cannot be bound by the admissions of another *unless such a relation is previously, and by other evidence, proved to exist between them as will enable one to involve the other in liabilities.* Faulkner v. Whitaker, 15 N. J. L. 438; Kilburn v. Ritchie, 2 Cal. 145; Atwell v. Miller, 11 Md. 348; Commonwealth v. Oberle, 3 S. & R. (Penn.), 9; Hill v. Myers, 43 Penn. St. 170. The declarations of parties at the time of a transaction are usually received as evidence as part of the *res gestae.* But the declarations of one of the parties at another time, and particularly in the absence of the other, are inadmissible. Ogden v. Peters, 15 Barb. (N. Y.) 560; Deveries v. Phillips, 63 N. C. 207; Stauffer v. Young, 39 Penn. St. 455. So, the declarations of a deceased person, between whom and the person sought to be affected by them there is no privity, are not admissible unless they were against his pecuniary interest existing at the time of the facts admitted, and unless the latter were such that he may be presumed to have had accurate knowledge of them at the time. Bird v. Hueston, 10 Ohio St. 418. The declaration of one who cannot be sworn as a witness because he is interested or infamous, cannot be received in evidence. Nettles v. Harrison, 2 M'Cord (S. C.), 230.

[11] Peppinger v. Law, 6 N. J. L. 384; Allen v. Duncan, 11 Pick.

were made in the presence of the other party, and were not contradicted by him,[12] they are competent evidence.

But whether in writing or by parol, they cannot as a rule be used as evidence in his favor. Even an indorsement of part payment on a promissory note is not of itself, and as a matter of course, admissible to take the note out of the Statute of Limitations.[13] So of a credit on an account book, the credit being small in proportion to the account, dated after six years have run, and apparently made with a view to elude the statute.[14] Admissions may arise in any kind of a case in a great many ways. So the failure of a party to explain suspicious circumstances within his knowledge is a proper subject of comment and weighs against him.[15] A settlement by a railroad with one party for damage from a fire is not an admission of liability as to another damaged by the same fire.[16] In an action against an employer for personal injuries to an employe his report to an accident insurance company on the accident is good as an admission, but the fact that the insurance company is defending the action is not competent evidence of negligence.[17] On the issue of the value of land taken by eminent domain evidence of the price at which the plaintiff gave an option on it shortly before the taking in question and the price at which he sold it shortly afterwards are admissible in evidence against him.[18] The classification of property by a municipal tax board is admissible in evidence against the city but not in its favor.[19] Where one of the allegations in a libel is that the plaintiff is a persistent law breaker, testimony of a game warden that the plaintiff attempted to bribe him is admissible.[20] Evidence of the payment to deceased of sick benefits by

(Mass.) 308; Sayre v. Durwood, 35 Ala. 247; Bayden v. Moore, 11 Pick. (Mass.) 362; Warden v. Powers, 37 Vt. 619; Holbrook v. Murray, 20 Vt. 525.

[12] Green v. Harris, 3 Ired. (N. C.) L. 310; Wilson v. Pope, 37 Barb. (N. Y.) 321; Johnson v. Brockway, 23 Ark. 382; Archer v. De Duff, 5 Barb. (N. Y.) 147; Corser v. Paul, 41 N. H. 24; Bailey v. Woods, 18 N. H. 28; Alston v. Granthum, 26 Ga. 374; Nusbaum v. Thompson, 11 Md. 557; Bradford v. Hagerthy, 11 Ala. 698.

[13] Whitney v. Bigelow, 4 Pick. (Mass.) 110; Roseboom v. Billington, 17 Johns. (N. Y.) 182.

[14] Taylor's Ex'rs v. M'Donald, 2 M'Cord (S. C.), 418.

[15] Kirby v. Tallmadge, 160 U. S. 379, 383, 16 S. Ct. 349.

[16] Creighton v. Chicago, R. I. & P. R. Co. (Neb., 1903), 94 N. W. 527.

[17] Roche v. Llewellyn Ironworks Co., 140 Cal. 563, 74 Pac. 147.

[18] Houston v. Western Washington R. Co., 204 Penn. 321, 54 A. 166.

[19] City of Philadelphia v. Gowen, 202 Penn. 453, 52 A. 3.

[20] Davis v. Hamilton, 88 Minn. 64, 92 N. W. 512, 515.

insurance companies is evidence as an admission of such sickness, as such payments are made only on demand.[21] In an action against the stockholders of a bank the pass books of depositors are admissible to show the indebtedness of the bank to them.[22]

[21] Leidenspinner v. Metropolitan Life Ins. Co., 175 N. Y. 95, 67 N. E. R. 123.

[22] McGowan v. McDonald, 111 Cal. 57, 43 P. 418, 52 Am. St. Rep. 149.

It was said in an early New York case, Roseboom v. Billington, *ante*, that the indorsement would have been admissible had it been shown to have been made at a time when it was against the interest of the party who made it. But this principle of receiving admissions is by no means universal, nor is it a sufficient reason that the admission is made before any controversy has arisen. Thus, in an action for goods sold, the defendant had been charged as trustee in respect to the debt in question as due to a third person, and had admitted this to be so, and had judgment against him. The debt was in truth due to the plaintiff, though the question was a doubtful one upon the facts. It was held, that the defendant's admissions in the former suit were not evidence for him. Wise v. Hilton, 4 Me. 425. In Minnesota, by statute, an indorsement of a payment made upon a note by the payee, at a time when the indorsement was against his interest, is made admissible as evidence of the fact of payment. Young v. Perkins, 29 Minn. 173. But in New York an entry in the party's books, though at the time against him, is not afterwards evidence for him. Thus, in another case, on a note payable to the plaintiff's testator, against five persons as makers, one question was, whether two were not principals, and the other three sureties. To show this, the book of the two crediting the note as their own to the testator at its date was offered by the defendants. Though the entry was against the interest of the two at the time, yet it was held that it could not be used in their favor, or in favor of their co-defendants. Schermerhorn v. Schermerhorn and others, 1 Wend. (N. Y.) 119. So, in an action on a note, dated 14th April, 1828, commenced by attaching the goods of the maker, Gregory, on the same day, Peck, a subsequent attaching creditor, was allowed to defend on the alleged ground that the plaintiff's note was a fraud on creditors. A part of the consideration of the plaintiff's note was two orders drawn by Gregory on and accepted by the plaintiff, in favor of two other creditors of Gregory, on the same day. To show that the orders were accepted anterior to the commencement of the suit, the plaintiff offered in evidence his own declaration to B., a witness, made on the same day, but before the attachment, that he had agreed to pay the debts secured by the orders. They were held inadmissible. The court, by PARKER, C. J., said: "The declarations of a party in his own favor, by the general rule, are inadmissible. There are cases of declarations or entries, operating in favor of the party making them, which are admissible; but in all instances they relate to or accompany some act, and therefore are a part of the *res gestae*. The declarations excluded in this case were not of that character, but mere naked assertions of a fact, which do not come within any of the exceptions to the general rule. It is said that the declaration so made is a fact. That is true; but the fact is also a declaration only, made by a party to support his own interest. Now it is true that, at the time of making the declaration, it probably had no reference to any controversy. Yet, if it is admitted that such declarations are good evidence, we shall soon find cases of declarations and assertions of a fact as having happened, with a view to support what may be afterwards done, when it is too late to have its effect, and when it may become necessary to antedate, if we may use the expression, the fact in controversy." Carter v. Gregory, 8 Pick. (Mass.) 165, 168, 169.

In Massachusetts, the return and acts of a ministerial officer are denied as evidence in his favor. Thus, in trespass by the plaintiff, a deputy sheriff, he proved that he had attached certain property of S., which was afterwards removed by the defendant. The defendant, another deputy, offered in evidence a writ and his own return upon it, showing that he had attached the same property the day before, and also, that on the day before he was seen at work within view of the property, and told a witness he had attached it. It was held that neither the return nor declarations were admissible, not being a part of the *res gestae*.[23]

Letters written by a party are not evidence for him.[24] Thus, in ejectment by the proprietor of Pennsylvania, the defendant showed a deed to himself. The plaintiff offered a letter from William Penn, the proprietor, to show that the grant was on a condition not performed. It was rejected on the ground that a man cannot create evidence for himself.[25]

If a party's declarations or admissions which, when taken in one way, are evidence against himself, are not to be received for him; if his letters in his own favor are to be excluded, it follows of course that other oral or written declarations, either indifferent at the time or favorable to his own interest, are inadmissible. Accordingly, in an action against A. & B., as partners, on a contract executed in the partnership name, A. suffered a default, and B. pleaded the general issue. It was held that letters written by A. in the partnership name could not be read in evidence by B., a partner with A.[26]

The registry of a vessel procured by a party is no evidence for him, though it may be against him.[27] A survey, though ancient, made by direction of the owner of the land, for his own convenience, is not admissible evidence for him or those claiming under him.[28] On a question whether the plaintiff to whom cotton was consigned as a factor of the defendant, had sold it in a foreign

[23] Merrill v. Sawyer, 8 Pick. (Mass.) 397, 398. But see Cornell v. Cook, 7 Cow. (N. Y.) 310, 313.

[24] Fowle v. Stevenson, 1 John. Cas. (N. Y.) 110; Champlin v. Tilley, 3 Day (Conn.), 303, 306. A letter written by one to the attorney of the opposite party is not evidence in his favor although replied to. Duystes v. Crawford (N. J.), 55 A. 823.

[25] Proprietary's Lessee v. Ralston, 1 Dall. (U. S.) 18.

[26] Champlin v. Tilley, 3 Day (Conn.), 303, 306.

[27] Ligion v. Orleans Nav. Co., 7 La. An. 682.

[28] Jones v. Huggins, 1 Dev. (N. C.) 223.

market, it was held that the plaintiff's letters, averring and inclosing an account of sales of the cotton, among other articles, though offered merely with the view of fixing the defendant with notice and subsequent acquiescence in the correctness of the accounts, and so to infer the sales, were inadmissible.[29] In an action against alleged partners, the declarations of the defendants, made subsequent to the commencement of the alleged partnership business, are not admissible for them to limit its nature and extent, as to show it an agency the one for the other; though an agreement between them, at or before its commencement, would be.[30] A written communication, made by the defendant to the plaintiff, in respect to the claim of the latter, was held inadmissible in evidence for the defendant.[31] In an action for fraudulently passing the bills of a broken bank, the plaintiff was denied liberty to prove that he showed the bills to the witness and stated that he had them from the defendant—even to show how the witness's attention was drawn to the bills, and thus strengthen the inference that he had correctly identified them with bills which he had before seen in the hands of the defendant.[32] An inventory made and returned by an administrator, after an action commenced by him for the recovery of property inventoried, is not evidence for him.[33] The admissions of a debtor against the garnishee in a foreign attachment are not receivable; for they go to throw the claim from the debtor upon another.[34]

Even an officer's return upon a process is not admissible in his favor to prove any fact stated therein except such as are required to be stated. Thus, in an action against a sheriff for not returning an execution within thirty days, his return, indorsed thereon, that he omitted to do so by reason of sickness, is not admissible to prove the fact; for it is no part of his office to make such a return.[35] Therefore it is no more than a written declaration by a private person. It is the same, although the declarant is dead, and his declarations are offered for his estate. Thus, in trover for bonds of the intestate, the defendant, the intestate's son, in-

[29] Anthoine v. Coit, 2 Hall (N. Y.), 40.

[30] Mitchell v. Roulstone, 2 Hall (N. Y.), 351.

[31] Birkbeck v. Burrows, 2 Hall (N. Y.), 51.

[32] Watson v. Osborne, 8 Conn. 363.

[33] Allender v. Riston, 2 G. & J. (Md.) 86.

[34] Enos v. Tuttle, 3 Conn. 247.

[35] Bruce v. Dyall, 5 Mon. (Ky.) 125.

sisted the intestate gave them to him. The intestate's declarations tending to negative this, made in the defendant's absence, were held inadmissible.[36] A corporation is in this respect on the same footing with natural persons. Thus the North Carolina State Bank being a mere private corporation, its books of accounts of bank dealing, in a suit between the bank and a third person, were held not admissible as evidence for the former.[37]

So the statements of a party's agent are not admissible for him, unless a part of the *res gestae*. Thus the letters of an agent giving his principal an account of what had taken place in respect to the matter of his agency were held to be inadmissible for his principal, even after the agent's death.[38]

The admission of a party's declaration in his own favor, if objected to, is fatal on error, although the court below directs the jury to disregard it.[39] Nor can the defendant prove a conversation between himself and the plaintiff's agent, to show admissions by the latter after the business of the agency has been closed, because the agent's declarations bind his principal only when they are a part of the *res gestae*, and his own declarations could only be admissible as forming a part of the conversation in which the plaintiff participated.[40]

There are, however, some exceptions to the rule that a party's declarations or admissions shall not be received as evidence for him. These exceptions arise in general when they are connected with some circumstance giving the evidence a force beyond what it can have as a mere naked assertion. Accordingly, a constable's return is evidence for him in an action for taking the goods away under pretense of a previous levy.[41] And there seems no good

[36] Romig v. Romig, 2 Rawle (Penn.), 241; Scull v. Wallace, 15 S. & R. (Penn.) 231.

[37] State Bank of N. C. v. M'Neil, 1 Hawks (N. C.), 36.

[38] Norton v. Smith, 4 Mon. (Ky.) 314.

[39] Tuttle v. Hunt, 2 Cow. (N. Y.) 436; Penfield v. Carpenter, 13 John. (N. Y.) 350; Fisher v. Bailey, 1 Ashm. (Penn.) 209.

[40] Budlong v. Van Nostrand, 24 Barb. (N. Y.) 25. In Meserole v. Archer, 3 Bosw. (N. Y.) 376, the court held it admissible to show the agent's declaration to her principal in reference to an act done and the reply; and in Bedell v. The Com. Ins. Co., 3 id. 147, evidence of conversations between the agent of the defendants and one West was admitted after it had been proved that the agent had been referred by the insured to West as the person who would settle the whole matter. But the general rule stands firm, that the declarations of a party cannot be received in his own favor. Isles v. Tucker, 5 Duer (N. Y.), 393; Erben v. Lorillard, 19 N. Y. 299.

[41] Cornell v. Cook, 7 Cow. (N. Y.) 310, 313.

reason why this should not be so. Indorsing a return is part of his office. It is an act, not only a part of the *res gestae,* but the *res gestae itself.* On what other principle is it that the record of a justice, drawn up for the very purpose, long after the conviction, will protect him against an action?[42]

A certificate of a justice of a judgment, execution or other proceeding in a cause before him, is evidence for himself. It may be made out after the expiration of his office.[44] And in an action by an officer for property levied on by him, his own indorsement on the execution of the property levied on is evidence to identify the property.[45]

An indorsement of part payment upon a promissory note, everything about it appearing fair, is admissible as evidence to the jury to take it out of the Statute of Limitations, and will control, unless the defendant impeaches it in some way.[46] As where the note was for four hundred dollars, and the indorsement, bearing date two years after the date of the note, was of three hundred and fifty dollars, leaving a balance of only fifty dollars. Or where it is proved that the indorsement was in truth made when it was against the interest of the party who made it.[47] In such case it will be received to rebut the presumption of payment arising from the lapse of time. But this is not the rule where the statute requires the promise to be in writing in order to remove the statute bar, or requires the evidence of payment to be in writing under the hand of the party to be affected thereby.

Where the party's declarations are a part of the *res gestae,* they are evidence for him.[48] Thus, although the declarations of a testator of the plaintiffs in general are not evidence for his executors, yet, where he had been administrator for the defendant's intestate, never having brought in his account, and this omission was urged against him as showing that he knew he had no claim, it was held that his declarations that the intestate's estate was indebted to him might be received to rebut the inference sought to

[42] Fawcett v. Fowles, 7 B. & C. 394; Rogers v. Jones, 3 id. 409; Mather v. Hood, 8 John. (N. Y.) 44; Bridgett v. Coyney, Esq., 1 M. & R. 211, *per* TENTERDEN, C. J.

[44] Maynard v. Thompson, 8 Wend. (N. Y.) 393.

[45] Spoor v. Holland, 8 Wend. (N. Y.) 445.

[46] Gibson v. Peebles, 2 M'Cord (S. C.), 418.

[47] Roseboom v. Billington, 17 John. (N. Y.) 182.

[48] Smith v. Morrow, 7 Mon. (Ky.) 234.

be raised.[49] So, on a trial for forcible entry and detainer, the question being upon the relator's entry, and the extent and nature of his possession, he having proved that he was in possession, was allowed to show his own declarations as to its extent, and the person under whom he held.[50]

The question whether, and how far, the introduction of the defendant's confession or declaration in evidence by the plaintiff, *et sic e converso,* will make it evidence for the party who made it, has arisen principally upon the confessions of prisoners on trial for crimes. By these cases and others, the following general doctrine seems to be well established:—*A party's declarations are evidence in his favor when introduced by his opponent, although their truth may be contradicted by contrary declarations of the former, or by other evidence; and the whole shall go together to the jury, who are not bound to credit the exculpatory confession.*[51]

A party's declarations are, of course, inquirable into, in order to test the credit of a witness; as, if the witness has stated them in a certain way, then the party may contradict him by showing what in truth he did say at the time, in order to correct or discredit the witness.[52]

Where there is direct evidence tending to show that an assignment of a legacy, absolute on its face, was in reality collateral security for an antecedent debt, previous and subsequent declarations of the assignee in reference thereto, made to third parties, are admissible as corroborative evidence,[53] and the fact that they are contained in the pleadings filed in the cause does not affect their competency.[54] And, if made in the presence and at the instance of others having a like interest with him, they are evidence against them;[55] and they are admissible in evidence against the person making them, although the witness testifying to them did not hear the whole of the conversation of which they form a part.[56]

Upon the question of the defendant's right to maintain a dam, evidence that the plaintiff at one time made the defendant an offer

[49] Scull v. Wallace, 15 S. & R. (Penn.) 231, 233.

[50] Smith v. Morrow, 7 Mon. (Ky.) 234, 236.

[51] Rex v. Jones, 2 C. & P. 629; Rex v. Higgins, 3 id. 603; Rex v. Clewes, 4 id. 221; Rex v. Steptoe, 4 id. 397; Smith v. Blandy, Ry. & M. 207.

[52] People v. Scott, Judicial Repository (N. Y.), 50.

[53] Kutz's Appeal, 100 Penn. St. 75.

[54] Adams v. Utley, 87 N. C. 356.

[55] Tredwell v. Graham, 88 N. C. 208.

[56] State v. Pratt, 88 N. C. 639.

for the land, stating that he wanted to buy it so that he might remove the dam, is competent as showing that the plaintiff recognized the defendant's right to maintain the dam.[57]

In cases where the rights of creditors, forced heirs or other third persons are in no manner affected, the declarations and admissions of the husband, made at a time not suspicious, that certain property belongs to his wife and was acquired by her, in her own right, by purchase or otherwise, in the absence of any charge of fraud or error, are legal and proper, and sufficient evidence against himself or persons claiming through him. And such admissions may be proved under the general issue.[58] So, in an action on an account, the admission that the account was correct is an admission that it was correct as to all its items.[59] A paper rejected as a contract may nevertheless, by admissions contained therein, bind a party to it.[60]

Letters written by, or at the instigation of, a party to an action to third persons, warning them not to aid the other party or to testify, or urging them to testify to a particular state of facts, are in the nature of admissions by conduct, and are admissible in evidence, and this, although they were written before suit brought, if the controversy preceding the suit was pending at the time.[61]

[57] Lynn v. Thomson, 17 S. C. 129.
[58] Brown v. Stroud, 34 La. An. 374.
[59] Keller v. Jackson, 58 Iowa, 629.
[60] Bishop v. Fletcher, 48 Mich. 555.
[61] Snell v. Bray, 56 Wis. 156.

Where an agreement between husband and wife, made before marriage, is set up as a bar to her right to recover dower in his estate by the heirs of the deceased husband, and the widow seeks to avoid the agreement as obtained from her by her husband's fraud, his declarations that the agreement was void or invalid, or good for nothing, and like expressions, are admissible in connection with other evidence as tending to show the alleged fraud. Wentworth v. Wentworth, 71 Me. 72. In an action on the case for erecting too high a dam, the plaintiff sought to introduce a declaration made by the grantor of those under whom the plaintiff and defendant claimed, to the effect that the dam was too high, the grantor being dead, and the declaration not being against interest, but rather in its favor, was held to be inadmissible. Putnam v. Fisher, 52 Vt. 191; 36 Am. Rep. 746. In an action by the widow of H. to recover of A. certain land claimed by A. under a parol promise of H. to convey, etc., declarations of H. were held to be admissible against the plaintiff, she claiming as H.'s widow and as grantee of H.'s heirs at law, and accordingly being in privity with H. So, declarations of the mortgagor or his agent amounting to a license to the mortgagee to sell the land, are admissible. Atwell v. State, 63 Ala. 61. But a party cannot escape the force of adverse evidence by introducing his own statements made before the trial to his attorney. Vanneter v. Crossman, 42 Mich. 465.

When, at the trial, the witnesses for one of two colliding vessels testified that the bow light of their vessel was burning, and on the day after the hearing of the cause the owners of the vessel caused the court to be informed, by their counsel, in open

When the admissions of a party afford any presumption against him, they are admissible.[62]

court, that, although the light was burning, it was covered with a tarpaulin at the time of the collision, it was held that such a statement, made under such circumstances, though forming no part of the evidence given at the trial, must be regarded as an admission given in the cause of the fact so stated. The Harry, 9 Ben. (U. S. C. C.) 524. In an action by an administrator upon a claim belonging to the estate, declarations made by him when not acting in the discharge of his duties, and to persons having no connection with the claim, are not competent evidence against him. Church v. Howard, 79 N. Y. 415. Facts stated in letters not replied to are not necessarily deemed to be admissible. Meguire v. Corwine, 3 MacArthur (D. C.), 81. A release of "all actions, and rights of action," given by the plaintiff to the defendant for valuable consideration, after suit brought, is not an admission by the defendant of indebtedness at the commencement of the suit. Crawford v. McLeod, 64 Ala. 240. The fact that a claimant gave notice of a trial of the right of property levied on under an execution, and that no trial was had, is held not to be an admission of the validity of the judgment, service, and return of process. Ledford v. Weber, 7 Ill. App. 87. In a prosecution for adultery, the question to the defendant, on cross-examination, whether his wife had not made a complaint against the other party for the alleged offense, cannot be admitted on the theory that the wife could not prosecute without his assent. People v. Knapp, 42 Mich. 267.

[62] Phelan v. Bonham, 9 Ark. 389; Goodnow v. Parsons, 36 Vt. 46; Wells v. Fairbanks, 16 Vt. 516; Tenney v. Evans, 14 N. H. 343; Hardy v. De Leon, 5 Tex. 211; McGill v. Ash, 7 Penn. St. 297; Doyle v. St. James' Church, 7 Wend. (N. Y.) 78; State v. Littlefield, 3 R. I. 124; Jones v. Morgan, 13 Ga. 515.

Thus the plaintiff, in an action for suffering the defendant's loaded cart to remain in the highway, introduced a witness who testified that the defendant, after the plaintiff received the injury complained of, said: "I did not mean to remove the cart and wood until somebody got injured, and then make known who put them into the traveled road;" and afterwards said: "What would you do? I am provoked every day. I won't touch the wood, if half the town runs into it and gets killed." It was held that such testimony was admissible, as it tended to prove that the defendant knew the situation of the cart and wood; that he recognized them as his own, and had not abandoned them, or resigned his claim to any trespasser; that he had a reasonable time to remove them, but purposely permitted them to remain; and as it furnished, also, strong evidence of the recklessness of the defendant, and might thus legitimately affect the question of damages in the case. Linsley v. Bushnell, 15 Conn. 225.

In another case, the plaintiff in an action on a guaranty, for the purpose of proving notice to the defendant of the plaintiff's acceptance of the guaranty and of the sale made under it, offered the declarations of the defendant that he knew of the existence of the guaranty; that he asked why the claim had not been presented to the commissioners on his estate; and that, in the conversation, he made no objection that notice had not been given him, but said, if the claim was not outlawed, and it was a continuing guaranty, he would pay it. It was held that such declarations were admissible. White v. Reed, 15 Conn. 457.

So where the defendant admitted to the officer who arrested him, in a suit on an open account, that the account was correct, although it was not then shown to him, the amount only being stated, it was held that there was some testimony before the jury for the plaintiff, and they refused to set the verdict aside. Sugar v. Davis, 13 Ga. 462. The admission might not have the effect of establishing the *amount* that was due, but

Declarations or admissions, after the execution of a will, by one of several legatees, who is also the executor and proponent of the will, tending to show undue influence, and want of mental capacity on the part of the testator, are not admissible in behalf of the contestants, where the legatees are not jointly interested, and there is no proof of conspiracy or combination between them.[63] Nor are the declarations of two or more persons who are shown to have been engaged in a common unlawful purpose admissible in evidence against the others, if made *after the completion of the*

it operated to show that something was due from him.

In an Indiana case, an action was commenced by A. before a justice of the peace, and taken by appeal to the circuit ocurt. It was held that on the trial on appeal the defendant might prove admissions which had been made by the plaintiff as a witness in a previous suit in the circuit court, brought by one B. against the defendant. M'Kinzie v. Reneau, 8 Blackf. (Ind.) 411.

In an Alabama case, it appeared that B. obstructed the waters of a brook so that they flowed upon the land of M. P. and W. afterwards purchased B.'s land, and maintained the obstruction. It was held in an action against them by M. that P.'s admissions as to the injury to the plaintiff's land from the overflow of water upon it, made a number of years before P. purchased an interest in B.'s land, were admissible against him. Polly v. McCall, 37 Ala. 20.

If he has given a reason for his conduct which is false, its falsity may be shown to enable the jury to infer the true reason. Tompkins v. State, 17 Ga. 356. So statements made by a party may be shown by way of inducement or illustration of other evidence. Grimes v. Talbot, 1 A. K. Mar. (Ky.) 205.

So they may be shown, although otherwise incompetent, where other parties have been induced to act upon them so that they would be prejudiced if they were withdrawn, and in such a case the party is estopped from denying their truth. Tompkins v. Phillips, 12 Ga. 52.

A party's admissions of marriage are competent evidence in support of a plea in abatement for the nonjoinder of her husband. Laughlin v. Eaton, 54 Me. 156. In an action upon an account stated by the plaintiff, but not signed by the defendant, it was held that the amount might be proved by the acknowledgment of the defendant. Vinal v. Burrill, 16 Pick. (Mass.) 401.

In an action where notice to the defendant was necessary before action brought, it was held that the admission by the defendant that he had received notice before the action was brought might be given in evidence, although not made until after the action had been commenced. Dole v. Young, 24 Pick. (Mass.) 250.

In an action of assumpsit two witnesses were produced by the plaintiff, who testified to conversations had with the defendant, in which the defendant requested one of them to procure the loan of a certain sum of money from the plaintiff, this loan being the fact in issue; the plaintiff produced a third witness to testify to a conversation between himself and the defendant about the same time, in which the defendant spoke of his intention to apply for the same loan that the testimony of the other witnesses showed that he did apply for. It was held that the testimony of such third witness was admissible. Clark v. McGraw, 14 Mich. 139.

Evidence given at a former trial by A. was offered as his admission, he being a party to the suit wherein it was offered. It was held that it might be introduced to prove such admission without the production of the record of the former trial. Kutzmeyer v. Ennis, 27 N. J. L. 371.

[63] La Bau v. Vanderbilt, 3 Redf (N. Y.) 384.

unlawful purpose.[64] In an action where a recovery may be had against the principal alone or against both himself and the surety, admissions made by the principal after breach of the obligation should not be received as against the surety.[65] The declarations of a partner, made in procuring a loan, to induce parties to become sureties for the partnership, or to become sureties of a renewal thereof at maturity, during the existence of the partnership, if acted on in good faith, are binding upon the partners.[66] In an action against G.'s administrator and P., on an alleged partnership debt of P. and G., the administrator denied the partnership, and P. admitted his individual liability, and pleaded his discharge in bankruptcy, which was not controverted. It was held that declarations by P., tending to prove his liability as a partner of G., were not admissible.[67] In an action by a wife to recover for wrongfully and maliciously procuring her husband to abandom her, his declarations, made in the defendant's absence, as to the cause of abandoning her, are inadmissible.[68] Declarations of a party made after suit brought, or after a rupture between the parties, are clearly inadmissible.[69] And the declarations of a grantor, after parting with his title, are not evidence to support or impeach it in the hands of the grantee; but, if part of a conversation is given by one party, the other may inquire into the whole.[70] Mere verbal declarations, that a release had been executed, will not be sufficient to establish the existence of a deed, more particularly where there is no other evidence to support the presumption of its having been executed.[71] Nor are the declarations of a party interested in the matter in controversy, if made at a time when he had no interest.[72] A party to a suit cannot be estopped by his oral admissions to a third person, if by independent evidence he shows that these admissions were contrary to the truth.[73] Admissions made with a view to a compromise are not admissible.[74] Nor those contained in a deposition

[64] Phillips v. State, 6 Tex. App. 364.
[65] Lee v. Brown, 21 Kan. 458.
[66] McKee v. Hamilton, 33 Ohio St. 7.
[67] Cowan v. Kinney, 33 Ohio St. 422.
[68] Westlake v. Westlake, 34 Ohio St. 621.
[69] Wetmore v. Mell, 1 Ohio St. 26.
[70] Posterns v. Posterns, 3 W. & S. (Penn.) 127.
[71] Lands v. Crocker, 3 Brev. (S. C.) 40.
[72] Burton v. Scott, 3 Rand. (Va.) 399.
[73] Husbrook v. Strawser, 14 Wis. 403.
[74] Wilson v. Hines, 1 Minor (Ala.), 255; Rideout v. Newton, 17 N. H. 71; Wood v. Wood, 3 Ala. 756; Perkins v. Concord R. R., 44 N. H. 223;

in perpetuam, or declarations made by the deponent at the time of giving the deposition.[75] Nor those made by the defendant or his attorney, not made to the plaintiff or in his presence.[76] Nor the confession of a party to a real action, that he had previously conveyed his right in the premises.[77] An admission by a party to a suit, that the suit must go against him, is not admissible.[78] Nor confidential overtures for pacification, or other propositions between litigating parties. But an offer to pay a debt in property instead of money is not an offer of compromise.[79] Nor the declaration of a party that a witness introduced by him knew nothing of the matter in controversy.[80] Nor that he had been served with a subpœna.[81] Nor a declaration by a party of an intention merely to do a certain act; except in connection with evidence tending to show that he actually did it.[82] Nor the statement of the plaintiff to a third person, in the presence of one of the defendants, not addressed to him, nor calling for any reply, and not replied to by him.[83] Nor whatever may be his interest in the matter in dispute, unless charged with knowledge of the acts complained of, are his acts or admissions evidence to affect his co-defendants.[84] Unsworn pleadings are never admitted as evidence against the pleader in another suit between him and other parties, as admissions or declarations of the facts contained in them. Still less would a party be bound by an expression of opinion as to the extent of his legal rights or liabilities.[85] In Missouri, where a plaintiff, in an action before a justice of the peace, examines the defendant, he cannot, on appeal to the circuit court, be allowed to prove the declarations of the defendant in testifying before the justice of the peace.[86] Evidence of admissions by a party that he authorized another to give a note to a third person for a specified sum, does not warrant the reading in evidence of a note corresponding with the note thus authorized to be made, without proof of its having been duly made.[87] A failure of title to lands can be shown only by documentary evidence; still, a witness, in testi-

Williams v. Thorp, 8 Cow. (N. Y.) 201; State v. Dutton, 11 Wis. 371.

[75] Dwinel v. Godfrey, 44 Me. 65.

[76] Green v. Sprogle, 16 Md. 579.

[77] Barnard v. Pope, 14 Mass. 434.

[78] Crockett v. Morrison, 11 Miss. 3.

[79] Ferry v. Taylor, 33 Mo. 323.

[80] Clarke v. Mershon, 2 N. J. L. 70.

[81] Hasbrouck v. Baker, 10 Johns. (N. Y.) 248.

[82] Bullock v. Beach, 3 Vt. 73.

[83] Gale v. Lincoln, 11 Vt. 152.

[84] Dawson v. Hall, 2 Mich. 390.

[85] Crump v. Gerock, 40 Miss. 765.

[86] Martien v. Barr, 5 Mo. 102.

[87] Minard v. Mead, 7 Wend. (N. Y.) 68.

fying to conversations with the party responsible in damages, may speak of such failure, if the plaintiff disavows all benefit of proof of failure of title arising from such conversations.[88] The contents of a letter which is lost, containing a memorandum of an admission, cannot be used as evidence, where the writer of it can only say that what he wrote was undoubtedly true, but that he has no recollection of the contents of the letter, except that it contained a proposition of settlement.[89] An admission contained in an undelivered instrument is not binding upon the party whose hand and seal are attached to it.[90] Where the question to be determined is the sanity of a person, both the acts and declarations of a person are evidence for the purpose of ascertaining the state of mind of the actor; but the effects of his acts and declarations on a third person, on the day before the homicide, cannot be shown, nor his acts and declarations then made in the absence of the accused.[91] As a general rule, a paper executed by a third person cannot be admitted as evidence of the truth of its recitals, when his declarations to the same effect would be inadmissible, on the ground of being hearsay evidence.[92] In an action brought for services in negotiating the purchase of real estate, a declaration of the plaintiff to the vendor of the land is inadmissible to show the amount the plaintiff was to receive for his services from the vendee.[93] Nor are admissions admissible to prove the contents of a written instrument, without its absence is accounted for by proof of notice to produce it on proof of its loss. The absence of the instrument in another State is not a sufficient reason for admitting parol evidence of its contents.[94]

Sec. 146. Whole Admission must be taken together.

An important rule relating to the admissions of a party is, that *the whole statement containing the admission must be taken together,* whether the admission is verbal or written; for although some part of it may contain matter favorable to the party, and the object is only to ascertain what he has conceded against himself,

[88] Morris v. Wadsworth, 17 Wend. (N. Y.) 103.
[89] Clute v. Small, 17 Wend. (N. Y.) 238.
[90] Robinson v. Cushman, 2 Den. (N. Y.) 149.
[91] Lake v. People, 1 Park. (N. Y.) Cr. 495.
[92] Garrigue v. Losher, 3 Bosw. (N. Y.) 578.
[93] Erben v. Lorillard, 19 N. Y. 299.
[94] Threadgill v. White, 11 Ired. (N. C.) L. 591.

and what may therefore be presumed to be true, yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained.[1] Thus in an action for personal injuries where the plain-

[1] Thomson v. Austen, 2 D. & Ry. 361; Fletcher v. Froggart, 2 C. & P. 569. It is a principle well settled, that the admissions of a party, where given in evidence, must be taken together, as well what makes in his favor as what makes against him. Storer v. Gowen, 18 Me. 174; Howard v. Newson, 5 Mo. 523; Reas v. Hardy, 7 Mo. 348; Taylor v. Whiting, 2 B. Mon. (Ky.) 268; Arnold v. Johnson, 2 Ill. 196; Newman v. Bradley, 1 Dall. (U. S.) 240; Farrel v. McClea, id. 392; Kammell v. Bassett, 24 Ark. 499; Wilson v. Calvert, 8 Ala. 757; Ward v. Winston, 20 Ala. 167; Barnum v. Barnum, 9 Conn. 242; Ives v. Bartholomew, id. 309; Bristol v. Warner, 19 Conn. 7; Morris v. Stokes, 21 Ga. 552; Withers v. Richardson, 5 T. B. Mon. (Ky.) 94; Turner v. Jenkins, 1 Har. & J. (Md.) 161; Whitwell v. Wyer, 11 Mass. 6; O'Brien v. Cheney, 5 Cush. (Mass.) 148; Moore v. Ross, 11 N. H. 547; Kelsey v. Bush, 2 Hill (N. Y.), 440; Carver v. Tracy, 3 Johns. (N. Y.) 427; Wailing v. Toll, 9 id. 141; Credit v. Brown, 10 id. 365; Hopkins v. Smith, 11 id. 161; Tenner v. Lewis, 10 id. 38; Perego v. Purdy, 1 Hilt. (N. Y.) 269; Overman v. Coble, 13 Ired. (N. C.) L. 1; Devlin v. Killcrease, 2 McMull. (S. C.) 425. But the jury may believe a portion and disregard the rest. Coon v. State, 21 Miss. 246; McCann v. State, id. 471; Lieett v. State, 23 Ga. 57; Field v. Hitchcock, 17 Pick. (Mass.) 182; Green v. State, 13 Mo. 382; Mattacks v. Lyman, 18 Vt. 98; Wilson v. Calvert, 8 Ala. 757; Brown's Case, 9 Leigh (Va.), 633. Where the evidence was, that the defendant, on being shown the plaintiff's account, said: "It is correct, but I have an offset," and no evidence was offered to prove any offset, it was held that a recovery for the amount of the plaintiff's account was warranted by the evidence. Delamater v. Pierce, 3 Den. (N. Y.) 315, 610. So where, in trover, a witness testifies that the property in question belongs to the plaintiff, that, as authorized by him, she pledged it on certain terms to the defendants, telling them the property was the plaintiff's, it was held it is not erroneous to allow the witness to state what she told the plaintiff was the bargain made. Meserole v. Archer, 3 Bosw. (N. Y.) 376. If a defendant relies upon an admission in a bill in equity, he must, as a general rule, take the whole of such admission. Stuart v. Kissam, 2 Barb. (N. Y.) 493. But there are exceptions to this rule. Thus, while the declarations of a party in possession of land, or of personal property, are admissible as explanatory of his possession, it is not permissible to prove everything he said in respect to the title, how it was acquired, etc., and an inquiry embracing so extensive a scope should be rejected. McBride v. Thompson, 8 Ala. 650. Nor can the declaration of a party be made evidence in his own favor on the ground that they were made in a conversation, part of which was called out on a cross-examination by the other party. Lynch v. McBeth, 7 How. (N. Y.) Pr. 113. Where the declarations of a vendor are given in evidence against him, in order to prove representations made by him at the sale, it is competent to prove *everything he said at the time upon the subject*, but not what he said subsequently. Bradford v. Bush, 10 Ala. 386. All that was heard of a party's admissions may be given in evidence against him, although more was said which was not heard. State v. Covington, 2 Bailey (S. C.), 569; Mays v. Deaver, 1 Iowa, 216; Williams v. Keyser, 11 Fla. 234. The rule that where confessions or admissions are introduced by one party, the opposite party is entitled to the whole conversation, does not give such party a right to the whole conversation of the witness, because he has stated some of his remarks necessary

tiff introduces in evidence the cross-examination of one of the defendants on a previous trial involving similar issues, the defendant should be allowed to introduce also the direct examination had at the same time.[2] Where an attorney so refers to a writing in examination of a witness that the jury must believe that they are listening to testimony as to its contents, it is considered put in evidence, although not shown or directly read to the jury, and the whole of it must be read on demand.[3] Where a party in a suit against a broker, introduces as an admission the broker's statement of account of stocks bought and sold, the broker is entitled to put in also a letter accompanying the statement showing terms of sale.[4] A plea of guilty to a criminal charge of assault is evidence in a civil action only as an admission and the defendant may show the whole statement he made in the criminal court to show that his plea there was not an unqualified admission of guilt.[5] A witness may testify to a conversation had with a party in the course of which the latter made admissions, even though the witness during the conversation repeated hearsay statements made to him by the opposite party.[6]

But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not folthat all the parts of the statement should be regarded as equally deserving of credit; but the jury must consider, under all the circumstances, how much of the whole statement they deem

to the understanding of what the party said. Young v. Bennett, 5 Ill. 43. Where a party offers in evidence the admissions of an opponent, though the whole admission must be taken and weighed together, it is not necessary that the jury should find it to be wholly true, or wholly reject the evidence. It must all be received as testimony for their consideration; but the truth of the whole, or any part, may be judged of from the declaration itself or from other testimony overruling or controlling those portions of the admission making against the party offering it. Pearson v. Sabin, 10 N. H. 205. And a court or jury may, on sufficient ground, believe part and disbelieve another part, yet such parts must be distinct, and relate to different matters of fact. Fox v. Lambson, 8 N. J. L. 275. The rule that a party's admissions are to be taken altogether, is limited to what was said at the time. Edwards v. Ford, 2 Bailey (S. C.), 461; Hatch v. Potter, 3 Ill. (2 Gilm.) 725; People v. Green, 1 Park. (N. Y.) Cr. 11. And the declarations of a party on one day, as explanatory of what was said by him on another day, and which was given in evidence, cannot be shown by testimony. Blight v. Ashley, Pet. (U. S. C. C.) 15.

[2] Weeks v. McNulty, 101 Tenn. 495, 48 S. W. 809, 70 Am. St. Rep. 693.

[3] Lombard v. Chaplin, 98 Maine, 309, 56 A. 903.

[4] Morris v. Jamieson, 205 Ill. 87, 68 N. E. R. 742.

[5] Risdon v. Yates, 145 Cal. 210, 78 Pac. 641.

[6] Fitzpatrick v. Tucker (Kan., 1904), 78 Pac. 828.

worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him.[7] The presumption or probability that those portions of a party's statement which are against his interest are true, is supposed to give credit to other parts of the same statement, with respect to which there is no such persumption, but perhaps a contrary presumption. A statement therefore received for the purpose of proving facts therein stated by him against his interest, is not to be excluded with respect to other facts stated which are in his favor.[8] It is, however, to be understood that the several parts of a statement are not necessarily entitled to equal credit; the jury may believe one, and reject the other.[9] A party may avail himself of the admissions of his opponent without being bound to accept all of his statements in explanation of the admissions.[10] So where a part of a paragraph in an answer of defendant is introduced admitting that the plaintiff was struck by the defendant's engine, this may be competent as an admission without the introduction of the remainder of the paragraph which sets up that the accident was not due to the negligence of the defendant's servants.[11]

And where the party, to substantiate a credit in his favor, produces an account made out by the opposite party, though he renders it evidence in the first instance to prove the debits against himself in the same account, yet this is not conclusive, and he will still be at liberty to disprove the debits,[12] or impeach them by showing them erroneous on their face.[13] And where, in an action for the price of one-half of a steamboat sold, the defendant admitted that he purchased it, but said he had paid for it, the plaintiff was allowed to disprove the latter branch of the confession by circumstances; and the jury thinking it was overcome, the court refused to disturb the verdict, the court saying: "Confessions must be taken together; but when extra-judicial, as in this

[7] Berman v. Woodbridge, 2 Doug. 788, *per* Lord MANSFIEELD; Smith v. Blandy, Ry. & M. 259, *per* BEST, C. J., Cray v. Halls, cited id. 258, *per* ABBOTT, C. J.; Whitwell v. Wyer, 11 Mass. 6, 10; Garey v. Nicholson, 24 Wend. (N. Y.) 350; Kelsey v. Bush, 2 Hill (N. Y.) 440.

[8] Beckham v. Osborne, 6 M. & G. 771.

[9] Berman v. Woodbridge, 2 Doug. 788; Rex v. Clewes, 4 C. & P. 221; Smith v. Hunt, 1 McCord (S. C.) 449.

[10] Detroit Electric Light & Power Co. v. Applebaum, 132 Mich. 555, 94 N. W. 12.

[11] Stewart v. N. C. R. R. Co., 136 N. C. 385, 48 S. E. 793.

[12] Walden v. Sherburne, 15 John. (N. Y.) 409; Turner v. Child, 1 Dev. (N. C.) 134.

[13] Jones v. Jones, 4 Hen. & Munf. 447.

case, the weight of evidence by which they may be rebutted depends on all the circumstances of the case as disclosed by testimony."[14]

[14] Quick v. Johnson, 6 Mart. (La.) 532, 533. And see Thommon v. Kalbach, 12 S. & R. (Penn.) 238, 240. So, where the evidence in *assumpsit* for money lent was, that the defendant said, "I borrowed the money, but I paid it," the jury were instructed that the confession must be received together, but that they were not bound to credit the assertion of payment; and they found for the plaintiff, owing to some slight evidence which tended to repel the assertion of payment. Newman v. Bradley, 1 Dall. (U. S.) 240. In an action for wages, as mate of a vessel, against the master, the latter said he was captain, but never engaged the plaintiff, who was employed by the owner. The court told the jury they must take the whole together, unless the part in his favor was inconsistent or improbable. The defendant had a right to choose his mate, though employed by the owner; and the mate had a three-fold remedy, one against the master, the same as a common sailor had; and gave the opinion of the court, that if the plaintiff served with the defendant's permission, he was liable. Farrel v. M'Clea, 1 Dall. (U. S.) 382. In another case, the plaintiff proved that he presented his account to the defendant, who said, "It is just, but I paid it by a man in Petersburgh; and had I time, I could prove it." The court said: "The rule is, that a confession shall be taken together; but if there are circumstances mentioned in the confession, which, when examined into, disprove the matter alleged in discharge, or where that matter can be disproved, the jury are to reject it, and go upon the other part of the confession only; as where he says, 'The account is just, but I paid it before such persons,' and they know nothing of the payment; or at such time and place, and it be proved that at that time he was not at the place, but at another, far distant; or if he says, 'The account is just, but I will prove it paid if I have time,' and he is allowed that time and called upon to make that proof, and does not; in such and the like cases, the matter in discharge will be rejected." Barnes v. Kelley, 2 Hay. (N. C.) 45. In stating an account, the creditor charged *inter alia* $150 for a wagon, which was the only item proved, and made the balance due to him $84, after giving several credits. He, at the time of stating the account, admitted that the wagon had been paid for, which, if he had not been allowed his other charges, would have made a balance the other way. The jury considered the written statement and confession all together, and discredited the latter, allowing the balance as struck. This was held proper. The court said the jury must judge what credit is due to any part of a statement, written or oral. Turner v. Child, 1 Dev. (U. S.) 133, 134. The defendant confessed he had committed a homicide by shooting at the vital parts of a negro, declaring at the time he intended to hit his legs; but other proof showed him within ten feet of the negro when he shot, so that he might have hit his legs if he had chosen. In trespass by the owner of the negro, it was held that the jury might reject the latter part of the confession and act on the first. Arthur v. Wells, 2 Rep. Const. (S. C.) 314.

On a reference to take an account the defendant claimed to have allowed to him credits for large disbursements contained in an account produced against him by his adversary. But the account did not say to whom nor for what the payments were made, nor did it give particulars of time; several items were discredited, and one had been allowed in another and distinct account. Chancellor KENT, on hearing exceptions to the master's report, said: "There is no doubt of the general rule, that when one party exhibits a paper in proof to charge his opponent, his opponent is entitled to use it in his discharge. But it does not follow that each part

It will be seen that the rule, simple as it appears, is not without difficulty in its practical application. It should be stated that it *applies equally to written and verbal admissions;* and, consequently, where a defendant has rendered a debtor and creditor account to the plaintiff, which the latter produces in proof of his demand, it will be equally admissible in evidence of the de-

is entitled to the same credit. The charge may be so clear and specific as to be conclusive, while the discharge is so loose and defective as to deserve no credit. We have seen that those discharges are inaccurate in some instances: that they have no precision or uncertainty as to place or circumstance, that we have evidence of the allowance of part on other proof, and of the *positive* injustice of other parts; and we are justified and bound, upon all sound principles, to reject the whole." Method. Ep. Ch. *et al.* v. Jaeques *et al.*, 3 John. Ch. (N. Y.) 115-117. Though, where a confession or declaration is given in evidence, a court and jury may, on sufficient ground, believe part and disbelieve another part, *yet such parts may be distinct and relate to different matters or facts*, as, "I acknowledge that *I borrowed the money*, but I *repaid it*." Fox v. Lamson, 7 N. J. Eq. 255.

When an account is presented to a party, containing items on both sides, and showing a balance against him, and he answers, "It is correct, but I have an offset," this is sufficient to authorize a verdict for the balance admitted to be due, no other evidence of the set-off being given. Delamater v. Pierce, 3 Den. (N. Y.) 315. The whole conversation relating to the admission may be given: that which tends to discharge the party making the admission, as well as that which tends to charge him. Dorlon v. Douglass, 6 Barb. (N. Y.) 451; Coon v. The State, 13 S. & M. 246, 471; Duffield v. Cross, 12 Ill. 397; Roberts v. Gee, 15 Barb. (N. Y.) 449. But the referee or jury is not bound to give equal credit to every part of the conversation or declaration, Beares v. Copley, 10 N. Y. 93; and it is proper for the court so to charge the jury. Barnes v. Allen, 30 Barb. (N. Y.) 653.

In an English case, Smith v. Blandy, Ry. & Mo. 257; Cray v. Halls, cited id., where ABBOTT, C. J., left the whole of a conversation to a jury to consider whether the facts asserted by a party in his own favor were not true, as well as those against him. And see Remmie v. Hall, Manning's N. P. (2d ed.) 376, cit. 3 M. & G. 834, in an action for goods sold and delivered, one of the plaintiff's witnesses stated, upon cross-examination, that he had heard the plaintiff say that the goods were sold under a written contract, which the plaintiff at the time showed the witness; a broker's note was then produced by the plaintiff's counsel, which the witness said was the paper spoken of. It was objected that the broker's note ought not to be received as evidence of the contract, unless the broker was called to prove it. But the objection was overruled, and it was held by BEST, C. J., that the whole of what a party says at the same time must be given in evidence, though what he says in his favor must not on that account be taken as true, but must be left, with all the circumstances, for the jury to consider whether they believe it or not. And in another case, (Randle v. Blackburn, 5 Taunt. 255. And see Thompson v. Austen, 2 D. & R. 361; Fletcher v. Froggatt, 2 C. & P. 569; Green v. Dunn, 3 Campb. 215; Smith v. Young, 1 Campb. 439; Barrymore v. Taylor, 1 Esp. 325; Com. Dig., tit. Evidence, B, 5; 12 Vin. Ab., tit. Evidence, A, 23; 2 Ventr. 171; Cooper v. Smith, 15 East, 103), it was held that where a person admitted a claim, but at the same time set up a counterclaim, the statement of the counterclaim was admissible to prove not only its existence, but also its truth and correctness.

fendant's set-off,[15] although the plaintiff will be at liberty, while relying on the creditor side of the account, to impeach items which appear on the debtor side.[16] If the admission is contained in an affidavit, a written examination,[17] an answer in Chancery, or other document complete in itself, the rule at common law is, that the whole document must be read, although the jury need not give equal credit to every part of it, and will frequently give credence only to such portions as make in favor of the declarant;[18] and so stringent is this rule, that where, on exceptions taken, a second answer had been filed, the defendant was allowed to insist upon having that also read, in order to explain what he had sworn in his first answer.[19] It has also been held that a party, against whom an answer in chancery is produced, may have the whole bill read as part of his adversary's case, on the ground that this is like the ordinary case of conversation, where the answers of a party cannot be given in evidence against him without also proving the questions which drew forth the answers. The jury, however, should in such cases be warned that the statements in the bill are not admissions of the facts contained therein, it being notorious that allegations not consistent with fact are frequently introduced into a bill for the sole purpose of eliciting truth from the opposite party.[20] Where the plaintiffs, who were assignees of a bankrupt, gave in evidence an examination of the defendant before the commissioners as proof that he took certain property, the court held that they thereby made his cross-examination evidence in the cause; and as, in this cross-examination, the defendant had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as *some evidence* on behalf of the defendant himself of the agreement and its contents; and that, too, although the absence of the document was not accounted for, and notice not been given to the plaintiffs to produce it.[21] So, in an

[15] Randle v. Blackburn, 5 Taunt. 245.

[16] Rose v. Savory, 2 Bing. N. C. 145; 2 Sc. 199, S. C.

[17] In Prince v. Samo, 7 A. & E. 630, COLERIDGE, J., asked whether the question had ever been decided as to depositions, to which the counsel replied that no express decision had been found.

[18] Bermon v. Woodbridge, 2 Doug. 788; Blount v. Burrow, 4 Brown, C. C. 75.

[19] R. v. Carr, 1 Sid. 418; B. N. P. 237; Lord Bath v. Bathersea, 5 Mod. 10; Lynch v. Clerke, 3 Salk. 154.

[20] Pennell v. Meyer, 2 M. &. Rob. 98, *per* TINDALL, C. J., 8 C. & P. 470, S. C.

[21] Goss v. Quinton, 3 M. & Gr. 825.

action against a sheriff, where an under-sheriff's letter was produced by the plaintiff to affect the defendant, it was held to be some evidence also of certain facts stated therein, which tended to excuse the sheriff;[22] and on a similar principle, where, in order to fix a sheriff in an action of trespass against him, the plaintiff put in his warrant under which the seizure was made, and which recited the writ of *fi. fa.*, the court held that this recital was some evidence of the writ, and consequently tended to protect the sheriff, as showing that the seizure was made by the authority of the law.[23]

The rule originally was, that where the admission was in the course of a *conversation* in which several distinct matters were discussed, *the whole conversation* was admissible, whether it related to the admission or not;[24] but the unreasonableness as well as injustice of this rule soon became obvious, and now it is held that *only that part of the conversation which explains or qualifies the matter before the court* is admissible.[25]

[22] Haynes v. Hayton, 6 L. J. K. B. (O. S.) 231, recognized in Bessey v. Windham, 6 Q. B. 172.

[23] Bessey v. Windham, 6 Q. B. 166.

[24] The Queen's Case, 2 B. & B. 846.

[25] Prince v. Samo, 7 Ad. & El. 627.

In the case last cited an action was brought for malicious arrest on a false suggestion that money was lent by the defendant to the plaintiff, when in fact it had been given to him. The plaintiff called his attorney as a witness, who happened to be present at the trial of a prosecution for perjury, instituted by the plaintiff against a witness in the action wherein he had been arrested. The defendant's counsel inquired of him, in cross-examination, whether the plaintiff had not, on the trial for perjury, stated that he himself had been insolvent repeatedly and remanded by the court. This question was not objected to. On his re-examination the same witness was asked whether the plaintiff had not also on that occasion given an account of the circumstances out of which the arrest had arisen, and what that account was, for the purpose of laying before the jury proof that the arrest was without cause and malicious. This question, expressly confined to that purpose, was, whether the plaintiff did not say, in the course of his examination, that the money was given and not lent. To this question the defendant's counsel objected, upon the ground that the circumstance of the defendant having proved one detached expression that fell from the plaintiff when a witness, did not make the whole of what he then said evidence in his favor. Lord DENMAN, C. J., at the trial was of opinion that the witness might be asked as to everything said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined; *but that he had no right to add any independent history of transactions wholly unconnected with it.* The court afterwards held that the line had been correctly drawn by his Lordship at the trial.

In this case, the *dictum* of ABBOTT, C. J., in the Queen's Case, just referred to, was cited, and Lord DENMAN, C. J., in giving the judgment of the court, observed, with regard to that *dictum*: "We forbear from entering into a detailed examination of the doctrine there laid down. We have considered it repeatedly with all

Upon a review, therefore, of the authorities, the correct rule seems to be as follows: That where a statement, forming a part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, *that would in any way qualify or explain that statement,* is also admissible; *but detached and independent statements, in no way connected with the statement given in evidence, are not admissible;* and that there is no difference in this respect between statements made in conversation by a party to the suit, and those made by a third party.

Sec. 147. Weight to be given to Admissions or Declarations.

Admissions or declarations may be very weak as evidence[1] or very strong, according to the circumstances under which they were made, and in all cases these circumstances should be carefully scanned.[2] Such admissions are only admissible when parol evidence is admissible to establish the fact.[3] An admission made by one while insane cannot be the foundation of a decree against him.[4] An admission by way of a demurrer to a plea is just as admissible as though admitted *ore tenus* before a jury.[5] It is not essential that the party making the admission should have personal knowledge of the facts admitted. If he believes a fact to be true upon evidence sufficient to convince him of its truth, his statement of such fact, if against his interest, is evidence against him; and though of an unsatisfactory character, it is still com-

the diffidence inspired by such an authority, but we cannot assent to it. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may, therefore, be strictly regarded as extra-judicial; that it was not necessary, as a reason for the answer to the question that was proposed; that it was not in terms adopted by Lord ELDON, or any other of the judges who concurred; that it was expressly denied by Lords REDESDALE and WYNFORD; and that it does not rest on any previous authority. We ought to add that, in our opinion, the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested." The question had reference to the re-examination of a witness for the purpose of letting in the whole of what he himself had stated in a conversation, see S. B. & B. 294, 296, and *supra.*

[1] Dupre v. McNight, 6 La. An. 146; Printup v. Mitchell, 17 Ga. 558; Horner v. Speed, 2 P. & H. (Va.) 616; Vaugh v. Haim, 6 B. Mon. (Ky.) 338; The Latty Ole, U. S. Adm. 329; Parker v. McNeill, 20 Miss. 355.

[2] Eaton v. Welsh, 29 Ga. 443; Wittick v. Kiffer, 31 Ala. 199; Fidler v. McKinley, 21 Ill. 308; Chandler v. Schoonmaker, 14 Ind. 324; Hoper v. Evans, 9 Miss. 195.

[3] Bivins v. McElroy, 11 Ark. 23; Brooks v. Ishell, 22 Ark. 488.

[4] Hoffman v. Overbey, 137 U. S. 465, 471, 11 S. Ct. 157.

[5] Coffin v. Knott, 2 Greene (Iowa), 582.

petent.[6] They may be sufficient, although they are not conclusive evidence against him,[7] and although they have been drawn from him by false suggestion,[8] but not where they were made under a misapprehension of his legal rights, where they go to defeat or establish such right.[9]

Representations made by a party to another person, with a view to gain credit or advantage, are admissible in evidence against him, and are conclusive. But such representations are not conclusive against him where there is no breach of good faith in receding from them.[10]

If a party to a suit, whether upon the stand as a witness or otherwise, is shown a paper containing written statements material to the issue and adverse to his interests, and he, after examination, admits that the statements therein contained are true, the paper containing the statements may go to the jury, in connection with his testimony or statements, as the admission of the party, and it makes no difference when, where or by whom the statement was thus written.[11]

In an action to recover for goods sold, proof of an admission by the buyer of the correctness of the account against him, there being no dispute on the trial as to the amount, is proof of the sale and delivery of the goods.[12]

An admission by one during his tenancy, under whom one of the plaintiffs claim, affects such plaintiff only.[13] By the common law, whenever the act or declaration of a party then interested would be evidence against himself, they will be evidence against his subsequent assignee, or party claiming under him.[14] But the expression of an opinion by one that he is liable for a certain debt is not evidence of his liability.[15] Nor can any presumption of a fact be drawn from it, where the fact is expressly denied.[16] The mere admission of

[6] Sparr v. Wellman, 11 Mo. 230; Kitchens v. Robbins, 29 Ga. 713.

[7] Cafferatta v. Cafferatta, 22 Mo. 235.

[8] Higgins v. Dellinger, 22 Mo. 397.

[9] Moore v. Hitchcock, 4 Wend. (N. Y.) 292.

[10] Tufts v. Hayes, 5 N. H. 452; Scammon v. Scammon, 33 N. H. 52.

[11] Rich v. Flanders, 39 N. H. 304.

[12] New York Ice Co. v. Parker, 8 Bosw. (N. Y.) 683; Griffin v. Keith, 1 Hilt. (N. Y.) 58.

[13] Grant v. Levan, 4 Penn. St. 393.

[14] Snelgrove v. Martin, 2 McCord (S. C.), 241; Ten Eyck v. Runk, 26 N. J. L. 513.

[15] Berryhill v. McKee, 1 Humph. (Tenn.) 31.

[16] Clarendon v. Weston, 16 Vt. 332; Brown v. Munger, id. 12; Smith v. Jones, 15 Johns. (N. Y.) 229; Ripley v. Paige, 12 Vt. 353.

a "debt" is not sufficient to charge the defendant with the whole demand of the plaintiff; but the amount must be proved.[17]

Sec. 148. Where and How a Party may Discredit his Admissions.

A party cannot rebut the evidence of his own admissions by different declarations made at other times,[1] but he may show that they were not true. When an admission is offered against a party he should be allowed to explain it. So where a letter is proved, in which one admits certain claims to be due, he has a right to explain why he did not mention certain counter claims he had.[2] The declarations of a party that he had promised to a stage line four horses are not evidence sufficient to warrant the inference that he was a joint proprietor, and it is competent to repel all inferences to his prejudice by showing that he actually sold three horses to the agent of the ostensible proprietor of the line.[3]

Although the declarations or admissions of a party are evidence against himself, yet they do not, when offered, justify him in introducing proof of his counter-declarations, made at a different time, unless the latter form a part of the *res gestae*.[4] He may show that he made them jocularly.[5]

The admission of a fact when not under such circumstances as to work an estoppel against the party making it, and when it is shown to have been made by one who could not have known the fact from his own knowledge, is but evidence of the existence of that fact, and may be denied by satisfactory testimony of witnesses who base their evidence upon personal knowledge.[6] A party is at liberty to explain them, or show that he was mistaken, and this, though the admissions were under oath.[7] Or that they were untrue or made under a mistake, unless another has acted,

[17] Quarles v. Littlepage, 2 H. & M. (Va.) 401; Douglass v. Davie, 2 McCord (S. C.), 219; Harrison v. McKinney, 2 Bay (S. C.), 412.

[1] Lee v. Hamilton, 3 Ala. 529; Hunt v. Roylance, 11 Cush. (Mass.) 117; Clark v. Huffaher, 26 Mo. 264; Tucker v. Frederick, 28 Mo. 574; McPeake v. Hutchinson, 5 S. & R. (Penn.) 295; Snowden v. Pope, Rice (S. C.) Ch. 174; Davis v. Kirksey, 2 Rich. (S. C.) 176; Jones v. State, 13 Tex. 168.

[2] Chamberlain v. Iba, (N. Y., 1905), 74 N. E. 481.

[3] Anderson v. Snow, 9 Ala, 247.

[4] Roberts v. Trawick, 22 Ala. 490.

[5] Beebe v. De Baan, 8 Ark. 510.

[6] Wynn v. Garland, 16 Ark. 440.

[7] Carter v. Bennett, 4 Fla. 283; Stewart v. Connor, 13 Ala. 94; Houghtaling v. Kelterhouse, 1 Park. (N. Y.) Cr. 241.

relying on them, so as to estop them.[8] *But a judicial admission, solemnly made, cannot be denied.*[9] So where lien claims were conceded to be valid in the lower court the concession cannot be withdrawn on appeal.[10] But although an answer filed in the name of a party in a bankruptcy petition is admissible in evidence in another proceeding against him, it may be controlled by evidence that he never in fact signed or authorized it.[11]

Notwithstanding the admission by the defendants of a judgment as evidence from which the jury might find a verdict for the whole amount of the claims sued on, but not conceding it to be conclusive evidence, it is competent for them to claim any credit to which they might show themselves entitled by proof.[12] Verbal admissions, hastily made without investigation, and in ignorance of material facts of a case, are not binding where the facts to the contrary are unequivocally established.[13] Where the general manager and president of a railroad has stated that its engine set a certain fire the railroad may still show that he was mistaken.[14]

When a party admits a letter or other document to be genuine by using it as such, he cannot afterwards deny its authenticity when his opponent desires to use it.[15] Where an admission was on the authority of a decision which has been overruled, and was to the prejudice of the party making it, he is held not to be bound by it.[16]

Evidence that a party is of poor health and subject to depression of spirits is admissible to invalidate his declarations, at such a time, as to his affairs.[17] So it may be shown that the admission was fraudulently or collusively made, and in that event it is not entitled to any weight with the jury.[18]

[8] Ray v. Bell, 24 Ill. 444; Young v. Foote, 43 Ill. 33; Pecker v. Hoit, 15 N. H. 143; Rice v. Railroad Bank, 7 Humph. (Tenn.) 39.

[9] Gridley v. Connor, 4 La. Ann. 416; Edson v. Freret, 11 id. 710.

[10] Hensel v. Johnson, 94 Md. 729, 51 A. 575.

[11] Nicholson v. Snyder, 97 Md. 415, 55 A. 484, 486.

[12] Matthews v. Dare, 20 Md. 248.

[13] Martin v. Peters, 4 Robt. (N. Y.) 434.

[14] Cheek v. Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488.

[15] Robeson v. Schuylkill Nav. Co., 3 Grant (Penn.) Cas. 186.

[16] Hays v. Cage, 2 Tex. 501.

[17] Brackett v. Wait, 6 Vt. 411.

[18] Ramsbottom v. Phelps, 18 Conn. 278.

Sec. 149. Parties to Negotiable Paper generally.

In an action upon a note, the declarations of a nominal plaintiff, *made before he parted with his interest in the note,* are admissible in evidence; and without proof of the time when he parted with his interest, his declarations, made at any time before suit brought, are admissible.[1] This is upon the principle that the admission is made by a privy in estate, but is confined entirely to admissions made while the proprietary interest existed.[2] Thus, a declaration by a testator that certain notes, which are particularly specified, were advancements to one of his children, is against his interest, although the notes were out of date, and is consequently admissible in evidence against the child's representatives.[3] But the declarations of a merchant's clerk, made to a notary public, cannot be admitted in evidence to show who was the holder of a note, unless such declarations were immediately connected with the solemnity of protesting.[4] Nor is the acceptance of security for all notes on which a party may have become liable, evidence that he authorized the signing of his name to notes not particularly specified in the deed, nor identified as having been secured thereby. An admission by a party that he has been fully indemnified means *indemnified against legal liabilities;* and even though he knew at the time that the person from whom he received the security had forged his signature, it is not to be construed as applicable to the forged signature.[5] In an action by an indorsee of a negotiable note, where the plaintiff is shown to have received it of the former holder *after it became due,* and he fails to show that he paid value for it, the suit is presumed to be prosecuted for the benefit of the former holder; and his declarations made while he held the note, *and after it became payable,* that it was given upon an illegal consideration, are admissible for the defendant.[6] But evidence of an admission by the defendant that he had given the plaintiff a note of the same amount with the note produced at the trial, which he would pay if time were given him, is not sufficient evidence of the execution

[1] Sally v. Gooden, 5 Ala. 78; Clews v. Kehr, 90 N. Y. 633.
[2] Smith v. De Ruitz, R. & M. 212; Phillips v. Cale, 10 Ad. & El. 106.
[3] West v. Bolton, 23 Ga. 531.
[4] Burt v. Gwinn, 4 H. & J. (Md.) 507.
[5] Walters v. Munroe, 17 Md. 150.
[6] Brisbane v. Pratt, 4 Den. (N. Y.) 63.

of the note produced.[7] Nor in a suit by the holder against the acceptor of a draft payable to a certain person or his order, can the plaintiff prove his own declarations, or the admission of any one who was not a party nor a witness in the cause; nor is the mere receipt of such person, stating the fact that the draft was made for his accommodation, competent testimony. But any evidence given tending to show that a draft was accommodation paper should be submitted to the jury.[8] The declarations of a deceased party to a note are inadmissible, although he might be a witness if living.[9] An acknowledgment made by the maker of a note to one who once held it as indorsee, will inure to the benefit of the holder.[10] Thus, in an action against three joint makers of a promissory note, the admissions of one of the defendants was held competent evidence against his co-defendants, at least until the inferences arising from the face of the note are rebutted, and it is shown that the party making the admissions is not jointly interested with the others,[11] even though the admission was made to the payee long before the note was purchased by the plaintiff who brings suit upon it.[12] In an action on a due bill by a payee, a paper signed by the plaintiff, admitting that he had not, then or at any time, any interest in the due bill, that it was made payable to him without his knowledge or consent, and that he did not know the owner, and certifying that the maker had informed him that the bill was given for money lost at cards, is admissible for the defendant as an admission of a party in interest or a trustee or agent binding upon the real owner in the absence of any evidence that he was not the real owner.[13] So in an action upon a note, which matured after the decease of the indorser, against his administrator, it is competent to prove notice by proving the admissions of the administrator, unless the administrator is present and is willing to testify to the point.[14] But an admission by the party liable upon a sealed bill, of a balance due on it, is not an acknowledgment of its execution; and, if it were, would not obviate the

[7] Palmer v. Manning, 4 Den. (N. Y.) 131.
[8] Wilt v. Snyder, 17 Penn. St. 77.
[9] Duncan v. Seaborn, 1 Rice (S. C.), 27.
[10] McRae v. Kennon, 1 Ala. 295.
[11] Camp v. Dill, 27 Ala. 553; Bound v. Lathrop, 4 Conn. 336; Barrick v. Austin, 21 Barb. (N. Y.) 241.
[12] Cooper v. Hocking Valley National Bank, 21 Ind. App. 358, 50 N. E. 775, 69 Am. St. Rep. 365.
[13] Hogan v. Sherman, 5 Mich. 60.
[14] Duncan v. Watson, 10 Miss. 121.

necessity of proving that fact by the subscribing witness, or accounting for his absence.[15] But proof that the defendant in an action on a note said, on being shown the note, that "it was right," and he would not object to "its coming in on the trial," is sufficient to authorize the admission of the note in evidence.[16]

Where the defense to an action upon an assigned note is, that the defendant was a mere accommodation drawer, an account, which had been exhibited by the party in interest on another trial between himself and others, explaining the origin of the note, and admissions made by him at the same trial, are proper evidence for the jury; but not his attorney's letters relative to this previous trial.[17] Nor are the declarations of the maker of a note given for an old one at the time of making the note, admissible to affect his legal liability on the note; but they are admissible to show whether the new note is entirely a new contract, or an extension of the old one.[18] It is not conclusive against the maker of a note that he has acknowledged that the signature to it was his.[19] The admissions of the maker are not admissible against an indorser, even though he indorsed the note at its inception as promisor.[20] Nor are the admissions of the maker of a note admissible in an action by the payee against the surety when such admissions were made in the absence of the surety.[21] In an action by the pawnor of a note more than six years old, to recover damages of the pawnee for not returning it after the debt for which it was pledged was paid, the defendant cannot give in evidence the declaration of the maker that nothing was due thereon to the plaintiff.[22]

Where evidence has been introduced to show that a note was one of several given by a person since deceased, in pursuance of a general design to settle his estate, declarations of the maker in relation to the consideration of such notes made a few days after they were given, are incompetent.[23] Nor in an action against one of several joint makers are the statements of another of the

[15] Hogland v. Sebring, 4 N. J. L. 105.
[16] Suydam v. Combs, 15 N. J. L. 133.
[17] Iglehart v. Jernegan, 16 Ill. 513.
[18] Nutter v. Stover, 48 Me. 163.
[19] Hall v. Huse, 10 Mass. 39; Salem Bank v. Gloucester Bank, 17 id. 1.
[20] Baker v. Briggs, 8 Pick. (Mass.) 122.
[21] Dexter v. Clemens, 17 Pick. (Mass.) 175.
[22] Thomas v. Waterman, 7 Met. (Mass.) 227.
[23] Hubbard v. Barker, 1 Allen (Mass.) 99.

makers admissible as evidence for the defendant, when objected to by the plaintiff.[24] But although a general partnership between two is not established by the admission of one of the alleged partners, yet where two are sued, as co-promisors, upon a note signed by one, and there is proof of an admission of liability by the other, such admission is evidence that the signing party was the agent to make the promise.[25]

Where one of two defendants, sued jointly on a note, pleads and proves his discharge in bankruptcy, evidence of his admissions and declarations, made while he was in fact insolvent, but before he obtained his discharge, is admissible, notwithstanding he may be the principal on the note, and the other defendant the surety.[26]

Admissions made by the payee of a note, through whom the plaintiff derives title as indorsee, are not evidence to charge the maker, although his admission made on a previous day, in discharge of the maker, had been given in evidence by the latter; the latter admissions not being made in the same conversation.[27]

In an action brought in the name of the payee of a promissory note not negotiable, for the benefit of the assignee, against the maker, the declarations of the payee, made after the assignment, and notice thereof to the maker, are not admissible in favor of the defendant.[28] Nor in a suit by the assignee of the payee of a promissory note can the defendant give evidence of declarations made by the payee, after his assignment, prejudicial to the interests of the plaintiff.[29] Nor in the case of commercial paper, negotiated before due, are the admissions of the payee admissible to impeach the consideration.[30] But declarations by the payee of a note, executed by a married woman and transferred before maturity, that he had taken it for her husband's debt, are admissible against the indorsee.[31]

Admissions made by the payee of a negotiable note, *made while he retains it in his possession,* are admissible, although he may previously have written thereon his indorsement to a third

[24] Nye v. Grubbs, 16 Miss. 643.
[25] Painter v. Austin, 37 Penn. St. 458.
[26] Brown v. Munger, 16 Vt. 12.
[27] Perry v. Graves, 12 Ala. 246. See, also. Russell v. Doyle, 15 Me. 112; Clark v. Peabody, 21 id. 500.
[28] Scripture v. Newcomb, 16 Conn. 588.
[29] Fleming v. Newman, 5 Blackf. (Ind.) 220.
[30] Stoner v. Ellis, 6 Ind. 152.
[31] Pilcher v. Kerr, 7 La. Ann. 144.

person, in whose name the action is brought.[32] So, in an action by an indorsee against the maker of a note transferred when overdue, the declarations of the indorsee may be given in evidence by the maker; but if he elects to call him as a witness, he waives his right to give his declaration in evidence.[33] Declarations by the payee of a promissory note to the attesting witness, at the time of his attestation, but in the absence of the maker, are not admissible against the maker to explain the payee's motive in wishing to have it attested.[34] But declarations made by the payee of a note while he was the owner are not admissible to affect one to whom he subsequently transfers it.[35] Thus, in a suit by a bank against the payee and indorser and an accommodation indorser of a promissory note, the dispute being as to the object of the note, and for what liabilities it was intended as collateral, admissions made by the former are not admissible as against the latter.[36] But in an action upon a note, where the signature is denied, the defendant may show the declarations of the plaintiff on the occasion of taking the note, and then prove such declarations to be false.[37]

Where a promissory note becomes the property of one not a party to it and this is known to the maker, and the holder commences an action upon the note in the name of the payee, the maker cannot give in evidence admissions made by the payee subsequent to the commencement of the suit.[38]

Sec. 150. Admissions by an Indorser.

An admission by an indorser that he indorsed a draft drawn by the defendant, for a certain sum, at a certain time, the sum and time corresponding with the draft in suit, is *prima facie* sufficient, in an action against him thereon, to establish the fact that he indorsed the draft in suit.[1] So the insolvency of the maker of a note may be established, in an action against the in-

[32] Whitier v. Vose, 16 Me. 403.
[33] Merrick v. Parkman, 18 Me. 407.
[34] Lincoln v. Lincoln, 12 Gray (Mass.) 45.
[35] Beach v. Wise, 1 Hill (N. Y.) 612; Paige v. Cagwin, 7 id. 361; Osborn v. Robbins, 37 Barb. (N.Y.) 481; Crayton v. Collins, 2 M'Cord (S. C.) 457; Washburn v. Ramsdell, 17 Vt. 299.
[36] Highland Bank v. Wynkoop, Hill & D. Supp. (N. Y.) 243.
[37] Depue v. Place, 7 Penn. St. 428.
[38] Hough v. Barton, 20 Vt. 455.
[1] Hyer v. Smith, 3 Cranch (U. S. C. C.) 437.

dorser, by the latter's admissions to that effect.[2] The admission of an indorser after a note is overdue, made to an indorsee, that he knew that no demand had been made upon the maker, and a promise made by him to pay the note notwithstanding such omission, is admissible in favor of a subsequent indorsee, in an action brought by him against the indorser.[3] In an action by the indorser of a dishonored bill against the acceptor, admissions made by the indorser while he owned the bill are admissible in favor of the acceptor.[4] But admissions made by the indorser of a note or bill which are not known to the indorsee cannot be used in evidence against him.[5] The declaration of an indorser that the maker told him that payment had been duly demanded of him is not admissible to establish the fact of demand and notice;[6] nor are his admissions affecting the validity of the note admissible, although it is shown that he still retains an interest in the note.[7] But the admissions of an indorser or assignor of a note, *made at a time when he had an interest and right of action therein,* are admissible.[8] But admissions made by him *after* his interest in the note has ceased are not admissible, as this would place it within the power of a person to defeat the rights of another by a mere naked statement, without the sanctity or responsibilities of an oath.[9]

Sec. 151. Admissions made by a Former Owner of a Note.

Admissions made by the holder of a note, before it was due and before indorsement, and which was negotiated before it was due, are not admissible against the indorser,[10] unless he had express notice of the defects to which the admission relates at the time when it was indorsed to him.[11] But when the note was overdue at the time of its indorsement, declarations of a prior holder, *made while he held the note, after it was due,* are admissible in evidence to show payment to such prior holder or any right of set-off which the maker had against him. But such dec-

[2] Raplee v. Morgan, 3 Ill. 561.
[3] Rogers v. Hackett, 21 N. H. 100.
[4] Shirley v. Ladd, 9 Me. 83.
[5] Blancjour v. Tutt, 32 Mo. 576.
[6] Tamer v. Dunell, 9 Mass. 332.
[7] Butler v. Damon, 15 Mass. 223.
[8] Abbott v. Muir, 5 Ind. 444; Williams v. Judy, 8 Ill. 282.
[9] Lester v. Baker, 6 Blackf. (Ind.) 439; Porter v. Rea, 6 Mo. 48; Bartlett v. Marshall, 2 Bibb (Ky.) 467; Matthews v. Houghton, 10 Me. 420.
[10] Drummond v. Smith, 3 Head. (Tenn.) 389.
[11] Glunton v. Griggs, 5 Ga. 424.

larations made by the holder before he took the note are inadmissible. So such declarations made by the holder after assigning the note to one from whom the plaintiff since took it are inadmissible, unless the assignment was conditioned to be void upon the payment to the assignor of a less sum than the amount due on the note, in which case the declarations are admissible in evidence for the defendant to the extent of the interest remaining in the prior holder.[3]

As a general rule, admissions made by a person after he has parted with his interest in a bond, note or other security, cannot be given in evidence in prejudice of the assignee.[4] But declarations of a former holder of a bill *transferred to the plaintiff after dishonor,* are competent to show that before such transfer the defendants were discharged from liability.[5] Although it is generally true that the declarations of a former holder of a bill, made while it was in his hands, are not admissible against a party who took it *bona fide,* in the course of business, before it became due, yet *where the defense, in an action by the indorsee against the acceptor of a bill, is that the acceptance was procured by fraud, and was without consideration,* and in support of this defense the defendant offered in evidence the declarations of a former holder of the bill, since dead, made while it was in his hands, it was held that such declarations were admissible for that purpose, but not to affect the plaintiff, unless such holder, from whom the plaintiff received it, had knowledge of the fraud at the time he took it.[6]

In an action by the payee against the drawer of a bill not accepted, the declarations of the drawee, made at the time of presenting the bill, that he had no funds of the drawer in his hands, are not admissible in evidence; the drawee, in such case, not being the agent of the drawer.[7] But the declarations of the payee of a negotiable note, *made while he retains it in his possession,* are admissible, although he may previously have written thereon his indorsement to a third person, in whose name the action is brought.[8] So, in an action by an indorsee against the maker of a

[3] Bond v. Fitzpatrick, 4 Gray (Mass.) 89.
[4] Cleveland v. Davis, 3 Mo. 331; Smith v. Shank, 19 Barb. (N. Y.) 344.
[5] Hollister v. Reznor, 9 Ohio 1.
[6] Roe v. Jerome, 18 Conn. 138.
[7] Carle v. White, 9 Me. 104.
[8] Whitier v. Vose, 16 Me. 403.

note transferred when overdue, the declarations of the indorsee may be given in evidence by the maker; but if he elects to call him as a witness, he thereby waives his right to give his declaration in evidence.[9] But in the case of commercial paper, *negotiated before due,* the declarations of the payee are inadmissible to impeach the consideration.[10] But declarations by the payee of a note, executed by a married woman, and transferred before maturity, that he had taken it for her husband's debt, are admissible against the indorsee.[11]

In an action brought in the name of the payee of a promissory note not negotiable, for the benefit of the assignee, against the maker, the declarations of the payee, *made after the assignment, and notice thereof to the maker,* are not admissible in favor of the defendant.[12] Nor in a suit by the assignee of the payee of a promissory note can the defendant give evidence of declarations made by the payee, *after his assignment,* prejudicial to the interests of the plaintiff.[13]

It is competent to show by the admissions of a party that a debt owed by him has not been paid. Thus the principal obligor in a bond to the United States gave to the collector who took the bond a draft of the amount. Suit was brought on the bond in the United States court, and on the draft, in the name of the collector, in a State court, and it was agreed that judgment by default should be entered on the bond, and that no other further proceedings should be had on the draft. Judgment on the bond remained unsatisfied, and the collector, who had paid the amount to the United States, brought another action on the draft. It was held that the plaintiff might repel any presumption, arising from

[9] Merrick v. Parkman, 31 Me. 407.

[10] Stoner v. Ellis, 6 Ind. 152.

[11] Pilcher v. Kerr, 7 La. Ann. 144.

[12] Scripture v. Newcomb, 16 Conn. 588.

[13] Fleming v. Newman, 5 Blackf. (Ind.) 220.

In an action of debt against A. and B. on a promissory note, alleged in the declaration to have been made by the defendants, A. made default, and B. pleaded *nil debet* under oath. It was held on the trial of the issue with B. that the plaintiff might prove the partnership of the defendants at the date of the note, and A.'s subsequent admissions respecting the execution of the note. Ensminger v. Marvin, 5 Blackf. (Ind.) 210. But where A., an indorser of a sealed note, indorsed it in blank to B., who delivered it to C. without indorsement, and C. in like manner sold it to D., and D., having written over A.'s name an indorsement to himself, sued A. as indorser, it was held that B. was a competent witness for A.; and that consequently his declarations, while he held the note, as to the amount he paid for it, were inadmissible. Lynn v. Jeter, 7 Blackf. (Ind.) 300.

such agreement, that the draft had been paid or canceled, by proof that the defendant had afterwards admitted that the draft was justly due and unpaid.[14]

Where a note, payable on demand, was indorsed and transferred by the payee, it was held that the declarations of the indorser, prior to the indorsement of the note, and in reference to it, were admissible for the purpose of showing that he was to be liable without demand or notice, and especially is this the case when the admissions are connected with subsequent conduct and declarations having the same tendency.[15] The consideration or validity of a note-bill, upon any ground, may be attacked by admissions made by the owner thereof at any time while he was owner, and after the note was due. Thus the payee of a note, payable to himself or bearer, stated, on the day after its date, and while he held it in his possession, that he had sold it, but that he had won the amount from the maker at faro, and in an action by the bearer of the note it was held that the declarations of the payee were admissible to show that the note was given for a gaming consideration.[16] But if the note was not due, and was subsequently negotiated *before it became due,* such admissions cannot be received to defeat the note, because to admit them would operate unjustly upon an innocent purchaser, and would destroy the value of commercial paper. Thus B., having possession of a promissory note, payable to H. or bearer, transferred it, before due, to D., and, by writing on the back of the note, guaranteed its payment. B. being dead, in a suit by D. against the drawer it was held that B.'s declarations, made after the transfer, were inadmissible in behalf of the defendant to invalidate the note, by showing that it was given for a gaming consideration.[17]

In an action by the indorsee against the maker of a promissory note, which was sold by the payee at a rate exceeding the legal rate of interest, evidence of the declarations of the payee, who was dead, that the note was an accommodation note, lent to him by the maker, is not admissible.[18]

The payee of a note, after it was duly made and delivered, gave it to the maker to keep until certain acts, to be done by the maker,

[14] M'Cobb v. Healey, 17 Me. 158.
[15] Fullerton v. Rundlett, 27 Me. 21.
[16] Sharp v. Smith, 7 Rich. (S. C.) 3.
[17] De Bruhl v. Patterson, 12 Rich. (S. C.) 363.
[18] Kent v. Walton, 7 Wend. (N. Y.) 256.

were performed, and the maker subsequently refused to redeliver it to the payee. It was held, in an action on the note by the payee, that the circumstances under which the note came to the possession of the maker might be given in evidence by him.[19]

The indorser of a note, before taking it, sent a messenger to the maker, with instructions to inquire if it were a business note. The answer was returned that it was. It was held, in a suit on a note to which the defense set up was that it was an accommodation note, that the foregoing facts having been proved, evidence might properly be admitted, coming from any person who made the declaration, that the messenger on his return stated this answer to the indorsee.[20]

The mere oral declaration of a deceased maker of a note, made during his last illness, "that the note, though nominally payable to A., was really for the benefit of B.," is admissible to show that the note, in fact, was the property of B.[21]

Sec. 152. Admissions of Persons Acting together Illegally.

Where two or more persons are associated for the same illegal purpose, an act or declaration of one of the parties in reference to the common object, and forming part of the *res gestae,* may be given in evidence against the other.[1] Thus, on an indictment against one of several who made a joint assault, the acts of the other may be given in evidence.[2] The rule may be said to be that, when there is a community of interest and design, the admissions or statements of any of the parties relating to the common object are admissible either in civil or criminal proceedings.[3] Thus,

[19] Garlock v. Goertner, id. 198.

[20] Robbins v. Richardson, 2 Bosw. (N. Y.) 248.

[21] Morein v. Solomons, 7 Rich. (S. C.) 97.

[1] See §§ 141-143, *ante.* American Fur Co. v. United States, 2 Pet. (U. S.) 358; Lincoln v. Claflin, 7 Wall. 132; Stewart v. State, 26 Ala. 44; Johnson v. State, 29 Ala. 62; Glory v. State, 13 Ark. 236; Clinton v. Estes, 20 id. 216; State v. Ross, 29 Mo. 32; State v. Nash, 7 Iowa 347; Colt v. Eves, 12 Conn. 243; State v. Grady, 34 id. 118; State v. Myers, 19 Iowa, 517; Oldham v. Bentley, 6 B. Mon. (Ky.) 428; State v. Hogan, 3 La. Ann. 714; State v. Havelin, 6 id. 167; State v. Soper, 16 Me. 293; Aldrich v. Warren, id. 465; Commonwealth v. Turion, 8 Gray (Mass.) 375; Commonwealth v. Brown, 14 id. 419; People v. Pitcher, 15 Mich. 397; Mask v. State, 32 Miss. 405; Moers v. Martin, 8 Abb. (N. Y.) Pr. 257; 17 How. Pr. 280; Patton v. Ohio, 6 Ohio St. 467; Fonts v. State, 7 id. 471; Preston v. Bowers, 13 id. 1; State v. Thibeau, 30 Vt. 100.

[2] United States v. Johnston, 1 Cranch (U. S. C. C.) 237.

[3] Clayton v. Anthony, 6 Rand. (Va.) 285; Snyder v. Laframoise, 1 Ill. 268. Dowie v. Driscoll, 203 Ill. 480, 68 N.

where several persons jointly attempt to perpetrate a fraud, the declarations of one of them, made during the progress and in the prosecution of the joint undertaking, or explaining acts done in furtherance of it, are admissible against the others.[4] But before such declarations of a person not a party to the action can be admitted, the common purpose, and his connection therewith, and the common unlawful design, must be shown; and evidence which is merely admissible upon the question of the common illegal purpose, but is insufficient to establish the fact, is not sufficient to make such declarations admissible, and, for this purpose, the question whether such common and unlawful design has been established is for the court.[5] In the case of conspiracy, proof of a division of the profits of the fraudulent enterprise is sufficient evidence of a combination to let in the evidence of one conspirator against the rest.[6] But admissions by one made after the undertaking is completed are not admissible against the others,[7] nor after the death of the person making the admission.[8]

Sec. 153. Admissions by Co-plaintiffs or Co-defendants.

The better rule seems to be that the admission of one plaintiff in an action is not admissible against his co-plaintiffs *unless their interest in the subject-matter of the action is joint.*[1] Nor can the admission of a merely nominal plaintiff, *made after the action was brought,* be given in evidence to defeat the action.[2] And the same rule prevails as to co-defendants,[3] and the admission of one

E. R. 56. Conspiracy for malicious prosecution, Lasher v. Littell, 202 Ill. 551, 67 N. E. R. 372.

[4] Jenne v. Joslyn, 41 Vt. 478; Lee v. Lamprey, 43 N. H. 13; Peterson v. Speer, 29 Penn. St. 479; Patton v. Freeman, 1 N. J. L. 113; Anthorp v. Comstock, 2 Paige Ch. (N. Y.) 482.

[5] Jones v. Hurlburt, 39 Barb. (N. Y.) 403; Burke v. Miller, 7 Cush. (Mass.) 547.

[6] Kimmel v. Geeting, 2 Grant's Cas. (Penn.) 125; Kelsey v. Murphy, 26 Penn. St. 78.

[7] Clinton v. Estes, 20 Ark. 216; Lynes v. State, 36 Miss. 617; Benford v. Sanner, 56 Penn. St. 336; Hunter v. Com., 7 Gratt. (Va.) 641.

[8] Gaunce v. Backhouse, 37 Penn. St. 350.

[1] Baswell v. Blackman, 12 Ga. 591; Raton v. Nichols, 22 Ark. 244; Barnum v. Hackett, 35 Vt. 77; Juby v. Brigham, 9 Humph. (Tenn.) 750; Armstrong v. Farrar, 8 Mo. 627; Hurst v. Robinson, 18 Mo. 82. The admission of a legatee under a will, as to the mental capacity of the testator, is not admissible against the others. Thompson v. Thompson, 13 Ohio St. 356; Irwin v. West, 31 Penn. St. 157.

[2] Sargeant v. Sargeant, 18 Vt. 371; Chrisholm v. Newton, 1 Ala. 371; Sykes v. Lewis, 17 Ala. 241; Mayer v. Inman, 2 Swan (Tenn.), 80; Dazy v. Mills, 10 Ill. 67; Brown v. Foster, 4 Ala. 282.

[3] Lenhart v. Allen, 32 Penn. St. 312; Burnham v. Sweatt, 16 N. H. 418;

is evidence against the other when they are sued upon a joint contract.[4] But where the contract is several, and one of two persons liable thereon is sued alone, admissions made by the other are not admissible.[5] In actions of tort, as in trover, the admission of one defendant is admissible against him, but not against the other,[6] although the other defendant should generally ask the court to direct the jury not to consider the evidence as affecting him, or it will not furnish a ground for a new trial.[7]

Sec. 154. Admission of One of Two or More Persons United in Interest.

An admission of one of two or more persons who were at the time of the admission *jointly interested in the subject-matter to which the admission relates,* is admissible against the others.[8] Thus, after *prima facie* evidence of a partnership has been given, the admission of one of the partners is admissible against the others,[9] although the partner making the admission is not a party to the suit.[10] But the admission must be made while the partnership still exists; if made *after its dissolution,* it is not admissible against the others,[11] unless, perhaps, to prove payment of a debt due to the firm.[12] The fact that it is against interest must be established, and the admission of one of two or more owners of land

Walling v. Roosevelt, 16 N. J. L. 41; Quinlan v. Davis, 6 Wheat. (Penn.) 169.

[4] Martin v. Root, 17 Mass. 222.

[5] Baker v. Briggs, 8 Pick. (Mass.) 122.

[6] Edgerton v. Wolf, 6 Gray (Mass.), 453; Hodges v. Hodges, 2 Cush. (Mass.) 455.

[7] Hubbell v. Bissell, 2 Allen (Mass.) 196; Williams v. Taunton, 125 Mass. 34.

[8] Dowie v. Driscoll, 203 Ill. 480, 68 N. E. R. 56; Bakeney v. Ferguson, 14 641; Barnwell v. Blackman, 12 Ga. 591; Oviatt v. Sage, 7 Conn. 95; Reagan v. Green, 13 Penn. St. 508. We have always regarded this rule as unsound and not sustainable upon principle. In the case of partners there is not only a joint interest, but each partner in the business of the partnership is an agent for the others, so held to be binding upon all. But in that his admissions very properly are the case of joint ownership or interest, where no partnership exists, neither owner is an agent for the other, and there seems to be no reason, therefore, why the admission of one should bind the other, and the rule to that effect in New York seems to best accord with principle. Lewis v. Woodworth, 2 N. Y. 512; Whitcomb v. Whitney, 2 Doug. 652; Vicary's Case, Gil. Ev. 51.

[9] Nicholls v. Dawding, 1 Starkie, 81 But judge must first determine whether there is *prima facie* evidence of a partnership. Hilton v. McDowell, 87 N. C. 364.

[10] Wood v. Braddick, 1 Starkie, 81. But this is denied in Rooth v. Quin, 7 Price, 198.

[11] Watson v. Woodman, L. R. 20 Eq. 721.

[12] Pritchard v. Draper, 1 R. & My. 191.

or personal property is not admissible against the other, because their interests are not joint, but several.[6] Thus, the admission of one of several owners of a vessel is not admissible against the others,[7] nor are the admissions of one tenant in common admissible against the other,[8] nor is the admission of a life tenant admissible against a person claiming by title paramount;[9] but the admission of one joint tenant is admissible against the other.[10] In order to make such an admission admissible against the other joint owners, according to the English cases, the parties must have a joint interest in the decision.[11]

A declaration of one of several legatees under a will, not made in the presence of the other legatees, is not admissible,[12] as it affects adversely other legatees.[13] But the admissions as to the capacity of the testator by the proponent of a will who is the recipient of substantially his entire estate and is charged with undue influence, are competent.[14] The declarations of an insured party as to the shooting which caused his death are not admissible against the beneficiary in the policy unless made as part of the *res gestae*.[15]

Sec. 155. Admissions by Husband or Wife.

A husband can be charged by the contract or admission of his wife only in consequence of some authority actually given, or necessarily implied from the circumstances under which she acts. But the circumstances under which the plaintiff's property went into possession of a defendant administratrix may be shown in detinue, by proving a request from the defendant to the plaintiff to that effect in the lifetime of her husband.[1] But as the wife

[6] The New Orleans, 106 U. S. 13.

[7] McMillan v. Cox, 36 Me. 95; Page v. Swanton, 39 id. 400; The New Orleans, 160 U. S. 13. Unless they navigate the vessel together; Blackstock v. Leidy, 16 Penn. St. 335.

[8] Dan v. Brown, 4 Cow. (N. Y.) 483.

[9] Hitt v. Roderick, 4 W. & S. (Penn.) 221.

[10] Moore v. Pearson, 6 W. & S. (Penn.) 51.

[11] Vicary's Case, Gilb. Ev. 61; LE BLANC, J., in 11 East, 581.

[12] Roberts v. Bidwell, (Mich., 1904), 98 N. W. 1000.

[13] Appeal of Carpenter, 74 Conn. 431, 51 A. 126.

[14] Lundy v. Lundy, 118 Iowa, 445, 92 N. W. 39. Only one person substantially interested.

[15] Sutcliffe v. Iowa Travelling Men's Association, 119 Iowa 220, 93 N. W. 90.

[1] Rochelle v. Harrison, 8 Port. (Ala.) 351. But, as stated, except where an agency is established, the admissions of the wife cannot bind the husband or be used against him. Queener v. Morrow, 1 Cald. (Tenn.) 123; Logan v. Link, 4 E. D. S. (N. Y. C. P.) 63; Lay Grae v. Peterson, 3

may act as the agent of the husband, declarations or admissions made by her while so acting, either under express or implied authority, are admissible against the husband,[2] or against her.[3] Admissions made by the wife are admissible against her in an action brought by her in her own name.[4] So they are admissible where she is joined with her husband as a party to the suit.[5] So her admissions are competent evidence when her trustees sue or are sued on her account.[6] But not if the husband is the hostile party.[7] So in a contest by creditors of a husband for certain property which his wife claimed as her separate estate evidence of declarations by the husband claiming ownership in the property is not admissible against the wife.[8] After a husband has duly transferred certain personal property to his wife his claim of exemption from attachment made to the sheriff is not admissible in evidence against her in an action against the sheriff for conversion of the property.[9] Her admissions are not admissible for the husband except where they form a part of the *res gestae*.[10] But in many of the States the legal status of the wife is extended by statute, and she is invested with the right to sue and be sued, and may testify for or against her husband, and under such statutes her admissions would be evidence where they would not be at the common law.

The *admissions of the wife*, as a rule, will *bind* the husband only where she had authority to make them.[11] This authority

Sandf. (N. Y.) 338; Walls v. Capped, 15 Mo. 448. In Kimball v. Currier, 5 Gray (Mass.) 458, it was held that the declarations of a wife as to the state of her husband's mind at the time he executed a certain paper cannot be shown in an action in which the validity of such paper is involved.

[2] Riley v. Suydam, 4 Barb. (N. Y.) 222.

[3] Leyner v. Leyner, 123 Iowa 185, 98 N. W. 628.

[4] Morrell v. Crowley, 17 Abb. Pr. (N. Y.) 76.

[5] Pook v. Hopkins, 2 Bailey (S. C.) 408.

[6] Hanson v. Parker, 1 Wils. 257; May v. Taylor, 6 M. & G. 266.

[7] Taylor on Ev., § 543. But this rule is varied essentially by statutes relating to married women in some of the states.

[8] Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

[9] Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917.

[10] Walton v. Green, 1 Cr. P. 621.

[11] Emerson v. Blonden, 1 Esp. 142; Anderson v. Sanderson, 2 Stark. 204; Carey v. Adkins, 4 Camp. 92; Meredith v. Footner, 11 M. & W. 202.

Where he sues for her wages, the mere fact that she earned them does not authorize her to bind him by her admissions of payment, Hall v. Hill, 2 Str. 1094; Taylor on Ev. 511, 512; nor can her unauthorized declarations affect him, even where he sues with her in her right; for in these and similar cases the right is his own, though acquired through her instrumentality, Alban v. Pritchett, 6 T. R. 680; Kelly v. Small, 2 Esp. 716; Denn v. White, 7 T. R. 112, as to her ad-

does not result, by mere operation of law, from the relation of husband and wife, *but is a question of fact, to be found by the jury, as in other cases of agency;* for though this relation is peculiar in its circumstances, from its close intimacy and its very nature, yet there is nothing peculiar in the principles of law which apply to it. As the wife is seldom expressly constituted the agent of the husband, the cases on this subject are almost universally those of implied authority, turning upon the degree in which the husband permitted the wife to participate either in the transaction of his affairs in general, or in the particular matter in question.

Where husband and wife are joint parties in a suit the declarations of each are admissible in evidence against the declarant, but not against the other.[12]

In an action for damages for an assault and battery by the wife of the defendant upon the wife of the plaintiff, the admissions of the wife of the defendant are not admissible in evidence to charge her husband.[13] And when husband and wife sue jointly for services rendered by the wife during coverture, her

mission of a trespass. Neither are his admissions as to facts respecting her property, which happened before the marriage, receivable after his death, to affect the rights of the surviving wife. Smith v. Scudder, 11 S. & R. (Penn.) 325. In regard to the inference of her agency from circumstances, the question was formerly left to the jury with great latitude, both as to the fact of agency and the time of the admissions. Thus, it has been held competent for them to infer authority in her to accept a notice and direction in regard to a particular transaction in her husband's trade, from the circumsstance of her being seen twice in his counting-room, appearing to conduct his business relating to that transaction, and once giving orders to the foreman, Plimmer v. Sells, 3 N. & M. 422. And in an action against the husband for goods furnished to the wife while in the country, where he occasionally visited her, her letter to the plaintiff, admitting the debt and apologizing for the non-payment, though written several years after the transaction, was held sufficient to take the case out of the Statute of Limitations. Gregory v. Parker, 1 Camp. 394; Palethorp v. Furnish, 2 Esp. 511, n.; Clifford v. Burton, 1 Bing. 199; 8 Moore, 16, S. C.; Petty v. Anderson, 3 Bing. 170; Cotes v. Davis, 1 Camp. 485. But this would not now be held; greater strictness has prevailed. In an English case, Meredith v. Footner, 11 M. & W. 202, where a wife, by her husband's authority, carried on the business of a shop, and attended to all the receipts and payments, the court held that admissions made by her to the landlord of the shop respecting the amount of rent were not admissible to bind the husband. Had the admissions related to the receipt of shop goods, they would have been evidence; but the fact that she was conducting a business for her husband did not constitute her his agent to make admissions of an antecedent contract for the hire of the shop, or to make a new contract for the future occupation of it.

[12] Chaslovka v. Mechalek, 124 Iowa 69, 99 N. W. 154.

[13] Hussey v. Elroyd, 2 Ala. 339.

admissions of payment cannot be received in evidence against them.[14]

Declarations of a husband that he sold a note belonging to the separate estate of his wife are not admissible in evidence after his death, against the wife, in an action brought by her against the holder of the note, for its conversion.[15] But the admissions of a married woman are competent evidence in an action by her trustee, suing for her use, in favor of the defendant.[16]

In an action against a husband and wife for trespass committed by the wife on the plaintiff, the admissions or declarations of neither of them can be introduced by the plaintiff to prove the trespass.[17] But in an action for a homestead, the declarations of the alleged wife are competent to prove that the plaintiffs are not married.[18]

Upon the contest of a will, evidence of what the widow of the deceased had said in relation to his insanity is inadmissible.[19]

In a suit brought by husband and wife jointly, *jure uxoris,* declarations made by her, not in his presence, are not evidence.[20] But the declarations of the plaintiff's husband that money to be paid by the defendant for premises in the husband's possession belonged to the plaintiff, and that he wished the contract to inure to her benefit, are admissible in evidence for the plaintiff, in an action brought to enforce the contract after her husband's death.[21]

If, pending a suit against husband and wife, the husband dies, and the suit proceeds against the wife alone, her admissions of the debt, made during coverture, are evidence against her. So in a suit against husband and wife for a debt contracted by the wife while sole, the admissions of the latter, made during coverture, are not admissible evidence.[22]

A husband's admissions are incompetent to prove him an agent for his wife, in matters concerning her separate property.[23]

Where the surviving wife sues to annul a sale by her and her husband to defendant, as a party interposed in a disguised donation to her husband, his and her declarations, though out of the

[14] Jordan v. Hubbard, 26 Ala. 433.
[15] Murphree v. Singleton, 27 Ala. 412.
[16] McLemore v. Nuckolls, 1 Ala. Sel. Cas. 591.
[17] Funkhouser v. Pogue, 13 Ark. 295; Burnett v. Burkhead, 21 Ark. 77.
[18] Poole v. Gerrard, 9 Cal. 593.
[19] Cook v. Osborn, 2 Root (Conn.) 31.
[20] Turner v. Coe, 5 Conn. 93.
[21] Crain v. Wright, 46 Ill. 107.
[22] Lasselle v. Brown, 8 Blackf. (Ind.) 221.
[23] Whitescarver v. Bonney, 9 Iowa, 480.

defendant's presence, are admissible against him as part of the *res gestae*.[24] But in a real action by husband and wife, to recover possession of land claimed in her right, evidence of the wife's declarations, made during coverture, has been held not to be admissible for the defendant.[25] But where the subscribing witnesses have been called and failed to show that a deed was executed by a wife, whereby she relinquishes her right of dower, the admissions of the wife, made during her widowhood, of her having executed the deed, are admissible as the next best evidence.[26] So, on the issue whether certain money belonged to plaintiff or to her late husband, testimony that she had no property at the time of his death, or for a year or two previous, may be rebutted by proof of his declarations to the contrary within that period.[27]

Evidence of declarations made by a husband, during coverture, is not admissible against his creditors to establish a secret parol agreement between him and the wife, in reference to property standing in the husband's name during his lifetime.[28]

Admissions and declarations of the wife, made both before and after marriage, of the making and execution of a parol antenuptial agreement, by which the husband was to have her *choses in action,* and pay her the interest thereon for pin money, are admissible in favor of the husband's representatives, against those of the wife who seek to get possession of the bonds and notes of the wife, which have been delivered to the husband pursuant to such agreement.[29]

Upon a joint indictment of husband and wife, the declarations of the wife, though criminating both, are admissible in evidence against her, but not against him.[30]

Sec. 156. Admissions by Attorneys.—For recent cases on formal admissions by attorneys, see § 167, *post.*

The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause. In some cases they are conclusive, and may even be given in evidence upon a new trial, although, previously to such trial, the party

[24] Thibodeaux v. Herpin, 6 La. Ann. 675.
[25] White v. Holman, 12 Me. 157.
[26] Frost v. Deering, 21 Me. 156.
[27] Linscott v. Trask, 38 Me. 188.
[28] Brooks v. Dent, 1 Md. Ch. 523.
[29] Crane v. Gough, 4 Md. 316.
[30] Com. v. Briggs, 5 Pick. (Mass.) 429.

gives notice that he intends to withdraw them, or though the pleadings are altered, provided the alterations do not relate to the admissions.[1] But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial.[2]

Another class of admissions comprehends those which attorneys make, not with the express intent of dispensing with proof of certain facts, but *incidentally,* while they are referring to other matters connected with the cause. These, which are generally the result of carelessness, though not regarded as conclusive admissions, are still considered, not unfrequently, as raising an inference respecting the existence of facts which the adversary would otherwise have been called upon to prove; and consequently it is very important that attorneys should exercise great caution in the language they employ while corresponding with their opponents. Thus, where, in an action against the acceptor of a bill, his attorney had served notice on the plaintiff to produce all papers relating to a bill, the description of which corresponded with that set forth in the declaration,—"which said bill," the notice went on to state, "*was accepted by the said defendant,*"—the court held that such notice was *prima facie* evidence of the defendant's acceptance;[3] and in an action against the owners of a ship, their joint ownership was inferred from an undertaking to appear for them, signed by their attorney, in which they were described as owners of the sloop in question.[4] Again, where the defendant's attorney, in an action of debt on a bond, had admitted the signature of the attesting witness, this was held, by implication, to amount to an admission of the due execution of the instrument.[5]

Admissions, however, contained in the *mere conversation* of an attorney, cannot be received against the client, although they relate to the facts in controversy. The reason of this distinction is found in the nature and extent of the authority given, the attorney being constituted for the management of the cause in court,

[1] Elton v. Larkins, 5 C. & P. 385; Doe v. Bird, 7 C. & P. 6; Langley v. E. of Oxford, 1 M. & W. 508.

[2] See cases cited in last note. Also Young v. Wright, 1 Camp. 141, *per* Lord ELLENBOROUGH.

[3] Holt v. Squire, Ry. & M. 282.

[4] Marshall v. Cliff, 4 Camp. 133.

[5] Milward v. Temple, 1 Camp. 375.

and for nothing more.[6] So, if a letter, sent by an attorney to the opposite party, is expressed to be written "*without prejudice,*" it cannot be received as an admission; neither can the reply be admitted, though not guarded in a similar manner.[7] If the admission was made before suit, it will be equally binding, provided it is shown that the attorney was already retained to appear in the cause.[8] But in the absence of any evidence of retainer at that time in the cause, there must be some other proof of authority to make the admission.[9] When the attorney is already constituted in the cause, admissions made by his managing clerk, or his agent, are received as his own.[10] Thus, where abuse of process is charged, an admission of a son of an attorney in charge of his father's office during his absence, is competent as to the conduct of a claim sent to his father, as against the client, who sent it.[11] The admissions of an attorney are not binding upon his client when made in reference to a transaction in which he had no apparent authority to act for him. Thus the declarations of an attorney who sold a note belonging to his client without authority, relative to his title to the note, not made at the time of the sale, are not admissible in an action between the true owner of the note and the purchaser.[12] Nor has an attorney with whom a demand is left for collection, such an interest in a suit brought by him thereon as to make his admissions competent evidence for the defendant in *audita querela* brought to set aside the judgment;[13] nor can admissions made by an attorney in one suit, be used as evidence in another suit between the same parties;[14] nor admissions made by him after his connection with the case has ceased.[15]

[6] Saunders v. McCarthy, 8 Allen (Mass.) 42; Young v. Wright, 1 Camp. 139, 141; Parkins v. Hawkshaw, 2 Stark. 239; Doe v. Richards, 2 C. & Kir. 216; Wilson v. Turner, 1 Taunt. 398.

[7] Paddock v. Forrester, 3 Scott, N. R. 734. See Jardine v. Sheridan, 2 C. & K. 24.

[8] Marshall v. Cliff, 4 Camp. 133; Gainsford v. Grammar, 2 Camp. 9.

[9] Wagstaff v. Wilson, 4 B. & Ad. 339; Burghart v. Angerstein, 6 C. & P. 695; Pope v. Andrews, 9 C. & P. 564.

[10] Taylor v. Williams, 2 B. & Ad. 845, 856; Standage v. Creighton, 5 C. & P. 406; Griffiths v. Williams, 1 T. R. 710; Truslove v. Burton, 9 Moore, 64; Taylor v. Forster, 2 C. & P. 195.

[11] Lord, Owen & Co. v. Wood, 120 Iowa 303, 94 N. W. 842, saying that "clients cannot in reason expect that every act in connection with the business affairs intrusted by them to an attorney will be done by him personally."

[12] Thomas v. Kinsey, 8 Ga. 421.

[13] Underwood v. Hart, 23 Vt. 120.

[14] Wilkins v. Stidger, 22 Cal. 231; Maffit v. Witherspoon, 10 Ired. (N. C.) L. 281.

[15] Janeway v. Skerritt, 30 N. J. L. 97.

Sec. 157. Declarations and Admissions of Agent.

It is a well settled rule of evidence that *the declarations or admissions of an agent will bind the principal in respect to matters about which he was authorized to act for him, if made at the time of the transaction,* so as to constitute a part of the *res gestae*,[1] or in reference to a transaction not yet completed;[2] but in order to make such admissions binding, the authority of the person making them must be established by other evidence than that he acted

[1] Fairlee v. Hastings, 10 Ves. 123; Tuttle v. Turner, 28 Tex. 759; Winter v. Bent, 31 Ala. 33; Keane v. Branden, 12 La. An. 20; Page v. Parker, 40 N. H. 47; Barnard v. Henry, 25 Vt. 289; Dykes v. Cockerell, 6 La. An. 707, Woods v. Banks, 14 N. H. 101; Byers v. Lawler, 14 Ark. 87; Lawry v. Harris, 12 Minn. 255; Griffin v. Montgomery R. R. Co., 26 Ga. 11; Covington, etc., R. R. Co. v. Ingles, 15 B. Mon. (Ky.) 237; Hynds v. Days, 25 Ind. 31; Tillotson v. McCrillis, 12 Vt. 477; Raiford v. French, 11 Rich (S. C.), 367; Converse v. Blumrich, 14 Mich. 109; Dorne v. Southworth Manuf. Co., 11 Cush. (Mass.) 205; Moore v. Bettis, 11 Humph. (Tenn.) 267; Rowell v. Klein, 44 Ind. 290; Rathel v. Brady, 44 Ind. 412; Anderson v. Rome, etc., R. R. Co., 54 N. Y. 334; Peck v. Ritchey, 66 Mo. 114; Verry v. Burlington, etc., R. R. Co., 47 Iowa, 549; Hydorn v. Cushman, 16 Hun (N. Y.), 107; White v. Miller, 71 N. Y. 118; Furst v. Second Ave. R. R. Co., 72 N. Y. 542; Schaefer v. Gilden, 3 Col. 15; Treadway v. Sioux City, etc., R. R. Co., 40 Iowa, 526; Tuggle v. St. Louis, etc., R. R. Co., 62 Mo. 425; Darling v. Oswego Falls Manuf. Co., 30 Hun (N. Y.), 276; Phelps v. Georgia Creek, etc., R. R. Co., 60 Md. 586; Pavey v. Wintrode, 87 Ind. 379; Louisville, etc., R. R. Co. v. Henley, 88 Ind. 535.

The declarations of an agent, within the scope of his authority, and in reference to the business in which he is employed, may be proved as the declarations of the principal. American Fur Co. v. United States, 2 Pet. (U. S.) 358; City Bank v. Bateman, 7 H. & J. (Md.) 104; Sharp v. New York, 40 Barb. (N. Y.) 256; Kasson v. Mills, 8 How. (N. Y.) Pr. 377; Hunter v. Hudson River Co., 20 Barb. (N. Y.) 493; Stewartson v. Watts, 8 Watts (Penn.), 392; Chorpenning v. Royce, 58 Penn. St. 476; Fring v. Breymeyer, 2 Phil. (Penn.) 92. To the contrary, Betts v. Bank, etc., 3 Stew. (Ala.) 18. Where the decision of a question depends at all upon the fact whether the plaintiff in a suit had assented to an act which was a deviation from the actor's strict line of duty, and of a kind for which the plaintiff could hold him responsible, it is proper to ask what the plaintiff's attorney said after the act was done; the case being one where an adoption by the plaintiff of the act illegally done concluded his remedy. Rogers v. Marshall, 1 Wall. (U. S.) 644. The declaration of an agent of the government, when not forming a part of the *res gestae*, does not bind the government, and cannot be receive as evidence. United States v. Martin, 2 Paine (U. S. C. C.), 68. A principal is chargeable with the false representations made by his agent in a sale where the agent is acting within the line of business committed to him. Morton v. Scull, 23 Ark. 289; Ferguson v. Hamilton, 35 Barb. (N. Y.) 427; Union Bank v. Campbell, 4 Humph. (Tenn.) 394. But an agent acting under a written authority from his principal cannot enlarge his powers by his own declarations, so as to bind his principal. Mapp v. Phillips, 32 Ga. 72. S. P. National, etc., Co. v. Bruner, 19 N. J. Eq. 331; New York, etc., Co. v. Beebe, 8 N. Y. 364.

[2] Morse v. Conn., etc., R. R. Co., 6 Gray (Mass.), 456; Halsey v. Lehigh Valley R. R. Co., 45 N. J. L. 26.

as a general agent of the party, and his mere declarations,[3] *and they must relate to the subject-matter of his agency, and be within the scope of his authority.*[4] Neither his declarations nor his acts are sufficient to establish his authority,[5] unless his acts and decla-

[3] Craighead v. Wells, 21 Mo. 404; Moffit v. Cresler, 8 Iowa, 122; Latham v. Pledger, 11 Tex. 437; Hatch v. Squires, 11 Mich. 185; Fitch v. Chapman, 10 Conn. 8; Senserbox v. McGrade, 6 Minn. 484; Mapp v. Phillips, 32 Ga. 72. In Brigham v. Peters, 1 Gray (Mass.), 139, the declarations of an agent, although accompanied by acts as such, were held not to be admissible to establish the fact of agency. Declarations made by the general agent of a telegraph company of its liability for an accident, *two months* after its occurrence, were held to be incompetent. Randall v. Northwestern Tel. Co., 54 Wis. 140; 41 Am. Rep. 17. In this case the general superintendent of the company having the general management of his business, sent a telegram two months after an accident, in which the liability of the company for an injury inflicted on the defendant was admitted. The plaintiff introduced this telegram in evidence. The Supreme Court held that it was not admissible, because the authority of the superintendent to admit away the rights of the company, could not be inferred from his position. "The inadmissibility of this evidence," said TAYLOR, J., "is fully established . . . upon well-established principles of law. Milwaukee, etc., R. R. Co. v. Tinney, 10 Wis. 388; Betts v. Farmers', etc., Co., 21 Wis. 80; Livesley v. Lasalette, 28 Wis. 38; Hazleton v. Union Bank, 32 Wis. 34; Richards v. Noyes, 44 Wis. 609; Ronnsavell v. Pease, 45 Wis. 506; Packet Co. v. Clough, 20 Wall. (U. S.) 540. These cases show that the rank or station of the person making the admission does not affect the question of its admissibility. In Hazleton v. Union Bank, *ante*, the admission of the president of the bank was held inadmissible. In Packet Co. v. Clough, *ante*, the admission of the captain of the boat could not be admitted. The authority to make the admission for the principal is not to be inferred from the position or rank of the party making the same. *If such authority is alleged to exist, it must be shown by competent proof.*"

In Webb v. Smith, 6 Cal. 365, declarations made by a general agent of a corporation, concerning a debt contracted by him for the corporation within the scope of his authority, were held admissible as *prima facie* evidence.

[4] Huebner v. Erie R. Co., 69 N. J. 327. 55 A. 273; Fogg v. Child, 13 Barb. (N. Y.) 246; Wood v. Banks, 14 N. H. 101; Runk v. Ten Eyck, 24 N. J. L. 756; Gooch v. Bryant, 13 Me. 386; Winter v. Burt, 31 Ala. 33; Demeritt v. Meserve, 39 N. H. 521; Neeley v. Naylee, 23 Cal. 152; Brehm v. Great Western R. R. Co., 34 Barb. (N. Y.) 256; Youcum v. Barnes, 8 B. Mon. (Ky.) 496; Austin v. Chittenden, 33 Vt. 553; Lamb v. Barnard, 16 Me. 356; Cooley v. Norton, 4 Cush. (Mass.) 93; Thomas v. Steinheimer, 29 Md. 268; Beardsley v. Steinmesh, 38 Mo. 168; Budlong v. Van Nostrand, 24 Barb. (N. Y.) 25; Benedict v. Denton, Walker (Mich.), Ch. 336; Waterman v. Peet, 11 Ill. 648; Rogers v. McCune, 19 Mo. 557. He is bound by the agent's false representations in reference to matters within his authority, although he did not know that the agent had made or did not authorize him to make them. N. Y., etc., R. R. Co. v. Schuyler, 34 N. Y. 30; Hunter v. Hudson River R. R. Co., 20 Barb. (N. Y.) 493. And he is bound by a warranty made by an agent in the sale of a chattel. Elzell v. Franklin, 2 Sneed (Tenn.), 236; Williamson v. Cannaday, 3 Ired. (N. C.) L. 349; Lane v. Dudley, 2 Murph. (N. C.) 119; Marckle v. Haskins, 27 Ill. 282.

[5] Teamster's receipts showing receipt of flour in good condition not admissible without proof of authority of teamster to bind his employer as to the quality of the flour. Sibley

rations upon that and former occasions are such independent proof as tend to establish a general authority;[6] that is, unless it is shown that similar transactions entered into by the person claiming to be an agent had been ratified and acted upon by the party sought to be affected by such admissions or declarations.[7] Thus, in the case last cited, proof that a "drummer" for a wholesale house had taken other orders for the same house, which had

Warehouse & Storage Co. v. Durand & Kasper Co., 200 Ill. 354, 65 N. E. R. 676; Seatt v. Crane, 1 Conn. 255; Folsom v. Batchelder, 22 N. H. 47; Richmond Iron Works v. Hayden, 132 Mass. 190; France v. Edwards, 77 N. C. 271; Gifford v. Landrine, 37 N. J. Eq. 127.

The agency of a party must first be proved by other evidence than his acts, before it can be assumed that his acts are binding on the principal. Scarborough v. Reynolds, 12 Ala. 252; Van Eppes v. Smith, 21 Ala. 317; Scott v. Crane, 1 Conn. 255; Cruikshank v. Comyns, 24 Ill. 602; Thurman v. Wells, 18 Barb. (N. Y.) 500; Dixon v. Haslett, 3 Brev. (S. C.) 475; Bank of Hamburg v. Johnson, 3 Rich. (S. C.) 42. Thus, without proof of agency, a warranty of a grass-cutting machine, signed "A. B., agent," was offered and received in evidence in an action upon warranty, and it was held that this was erroneous. Gray v. Gillilan, 15 Ill. 453.

Where a deed executed by one as agent is exhibited, but his authority is not proved, the title must be considered as residing in his principal, who should have been made a party to the suit; and if the bill is dismissed, it should be without prejudice. Pope v. Melone, 2 A. K. Marsh. (Ky.) 239. Relinquishment of title to land, made to the State by a person asserting himself to be an agent, is not operative upon the holder of the title unless the agency is proved. Morgan v. Marshall, 7 J. J. Marsh. (Ky.) 316. In an action against a corporation for injury done by their agent it is not necessary to prove that the agent had authority under the corporate seal, nor under an order entered upon the books of the corporation. Hooe v. Mayor, etc., of Alexandria, 1 Cranch (U. S. C. C.), 90. The certificate of a notary public, under his notarial seal, of the acknowledgment by the principal of a power of attorney, is sufficient, in Alabama, to authorize its admission in evidence. St. John v. Redmond, 9 Port. (Ala.) 428. The authority of an agent to assume the payment of the debt of a third person, for his principal, should be clearly proved, or no recovery can be had upon such promise against the principal. Reading R. R. v. Johnson, 7 W. & S. (Penn.) 317. It will not be presumed that the agents of an insurance company have authority to make parol contracts to insure; such authority must be shown affirmatively. The declaration of such agents, in the course of business, that it was not customary to give policies upon such insurances, though they received the premium, is not sufficient to prove the authority of the agents to insure by parol. Aetna Ins. Co. v. North Western Iron Co., 21 Wis. 458. To make a letter to an agent evidence in a case, the agency must first be established. Brown v. Bank of Missouri, 2 Mo. 191; Brown v. Harrison, 17 Ala. 774. In an action against the principal, on paper purporting to be signed by his agent, the agency and authority to draw checks must be proved to entitle the plaintiff to recover. Flax and Hemp Co. v. Ballentine, 16 N. J. L. 454. Where one is agent of another to offer a reward for the apprehension of a criminal, in order to bind the principal, it is necessary to prove the simple fact of the agency, and not the way in which it was created. Currie v. Swindall, 11 Ired. (N. C.) L. 361.

[6] Cobb v. Lunt, 4 Me. 503; Wailes v. Neal, 65 Ala. 59.

[7] Nation v. Thomas, 25 Tex. 221; Murray v. Chase, 134 Mass. 92.

been regularly filled by it, was held sufficient to authorize evidence of his representations as an agent in its behalf. It is the province of the court to determine whether there is sufficient *prima facie* evidence of agency to render his acts and declarations admissible;[8] but where there is any legal evidence tending to establish

[8] Muroe v. Stutts, 9 Ired. (N. C.) L. 49. Mere proof of a person's recognition of another's authority to make purchases as his agent on one occasion is not sufficient to charge the former for a subsequent purchase of the same kind (in this case, of cattle and sheep on credit) made by the latter, claiming to act as his agent,—it must be shown that the vendor, at the time of such purchase, was cognizant of those acts of recognition. Maxey v. Heckethorn, 44 Ill. 437.

Where the question is whether an agent not having, by the papers which created him such agent and defined his powers, any authority to alter a policy which had been issued by his principal, was permitted to alter policies in respect to dates of sailing, from time to time, so that that became the customary usage and course of business, the evidence must show, in order to bind the principal, at least several cases in which the agent, without asking the sanction of his acts by the principal, had made alterations of a like nature on which the principal had acted, and in which he had acquiesced, when such alterations came to his knowledge; or it must tend to prove that, although communicated by the agent, they were acquiesced in as acts which he was competent to perform, and as binding on his principal; or that he was held out to the public as authorized to do such acts. Bunten v. Orient, etc., Ins. Co., 4 Bosw. (N. Y.) 254.

The action upon book account to recover for property claimed to have been sold by the plaintiff to the defendant, but which property was in fact sold and delivered to a third person, who was doing business in the name of the defendant, and who, as between himself and the defendant, had no right to pledge the credit of the defendant for the purchase of the property, cannot be sustained upon the ground, merely, that the plaintiff was justified in regarding the defendant as the principal in the business, unless he also had sufficient grounds for believing that such third person was authorized to make the purchase upon the credit of the defendant. And such authority cannot be established merely by showing that such third person had, in a few instances, made purchases in the name of the defendant, such purchases having been in fact unauthorized by him before they were made, and not understandingly sanctioned and adopted afterwards. Brown v. Billings, 22 Vt. 9.

The rule that an instrument which is apparently the personal obligation of the signer, may by parol be shown to be the obligation of another, for whom the signer was acting as agent, applies exclusively to cases in which it appears in the body of the instrument, or from the signature of the persons by whom it is executed, that he was acting for another, and intended to bind such other, and not himself personally. In such cases, where the party to whom the obligation is given understands the character in which the party giving it is acting, parol evidence may, it seems, be given to show that the maker or obligor was acting in the matter as agent merely.

But where there is nothing of that kind, either in the body of the instrument or attached to the signature, to indicate that it was intended to be anything other than a personal obligation, such evidence is inadmissible. Auburn City Bank v. Leonard, 40 Barb. (N. Y.) 119.

In an action brought to recover property alleged to have been wrongfully delivered by an agent, who was also a witness, to the defendant, who had notice that such agent was exceeding her authority, the fact that such witness and agent made a writ-

authority, the whole question may properly be submitted to the jury with instructions to find whether the agent was acting within the scope of his authority in making the admissions, and if not, to lay the evidence out of the case.[9] Proof of authority, independent of the acts or declarations of the agent, must be given.[10] The mere rank or position of the person, as that he is general superintendent, general manager, general agent, etc., of the principal, is not of itself sufficient evidence of his authority to make the admission *unless it was made in reference to a transaction in which he participated, and under such circumstances as make it a part of the res gestae;*[11] consequently, except where made by the agent *as and for the principal,* and with competent authority, in order to be admissible, they must constitute a part of the *res gestae.* The true doctrine in reference to the admissibility of this class of evidence was stated by DALLAS, C. J., in an early English case.[12] He said, "It is not true that where an agency is established, the declarations of the agent are admitted, merely because they are his declarations; *they are only evidence when they form a part of the contract entered into by the agent on behalf of the principal,* and in that single case they become admissible. The declarations of an agent at a different time have been decided not to be evidence; indeed, the cases on the subject draw this distinction between the declarations of an agent accompanying the making of, and therefore forming a part of, the contract,

ten contract with the defendants, which imported that she sold to them such property as her own, does not make evidence that she, at the time, told them the property belonged to the plaintiff, inadmissible. Meserole v. Archer, 3 Bosw. (N. Y.) 376.

In an action by a third party against a principal, upon a transaction with the agent of the latter, letters between the principal and agent are admissible in favor of the plaintiff to prove the nature of the agency. Thurston v. Mauro, 1 Greene (Iowa), 231.

If the defendant has authorized another to subscribe his name to a note, the fact need not appear on the note, but may be proved by parol. Morse v. Greene, 12 N. H. 32.

[9] Matzenbaugh v. People, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134. Where a defendant directed his daughter to write in reply to a letter asking payment of a book account, without giving her particular instructions, her letter is admissible against him. Skidmore v. Johnson, 68 N. J. 674, 57 A. 450; Wendell v. Abbott, 45 N. H. 349.

[10] Wailes v. Neal, 65 Ala. 59.

[11] Randall v. Northwestern Tel. Co., 54 Wis. 140; Scott v. Middletown, etc., R. R. Co., 86 N. Y. 200. The declarations of an agent are received as evidence against his principal, not as admissions, *but because they are a part of the res gestae.* Haven v. Brown, 7 Me. 425; Virginia, etc., R. R. Co. v. Sayers, 26 Gratt. (Va.) 328.

[12] Betham v. Benson, Gow, 48; Coyle v. Baltimore, etc., R. R. Co., 11 W. Va. 94.

and those made either at a subsequent or antecedent period. These declarations, when admissible, constitute original evidence, and are not mere hearsay. *They bind the principal only when made during the continuance of the agency in regard to a matter then depending et dum ferret opus.* The ground upon which they are admitted is the legal identity of the principal and the agent, and the fact that his declarations are a part of the *res gestae.*[13]

Thus statements made by a master of a vessel to one injured, immediately after the accident, are admissible as part of the *res gestae,*[14] and the acts, conduct and language on the day of arrest of a prosecuting agent of a corporation are competent in an action for malicious prosecution against the corporation.[15] Statements made by local officers of a Mutual Benefit Society to the Central Office in passing upon a beneficiary's claim for death are admissible in evidence against the society on account of the agency of the local officers.[16] Declarations by an agent in possession of goods to an official while he was making an official examination as to whether they should be seized for forfeiture are admissible against the owner as part of the *res gestae.*[17] On the issue whether an owner of an invention furnished proper plates for its manufacture, statements by an agent of the manufacturers in charge of the business as to the operation of the machine held admissible.[18] Statements made by the general superintendent of a railway on arrival at the scene of a wreck some three hours after it had occurred, while examining the wheels, one of which was broken, to the effect that "if the company used any more Tacoma wheels he would not work any more for them" and "I cannot be putting new wheels under the cars all the time" are admissible as part of the *res gestae.* They are made by one having control and management of the road under such circumstances

[13] HENRY, J., in McDermott v. Hannibal, etc., R. R. Co., 73 Mo. 516, 39 Am. Rep. 526; Griffin v. Montgomery R. R. Co., 26 Ga. 111; Moore v. Meacham, 10 N. Y. 207; Robinson v. Fitchburgh, etc., R. R. Co., 7 Gray (Mass.), 92; Galceran v. Noble, 66 Ga. 307; Franklin Bank v. Steam Navigation Co., 11 G & J. (Md.) 28.

[14] Lambert v. LaConnor Trading and Transportation Co., 30 Wash. 346, 70 Pac. 960.

[15] Southern Car & Foundry Co. v. Adams, 131 Ala. 147, 32 Southern, 503, 506.

[16] Patterson v. United Artisans, 43 Ore. 333, 72 Pac. 1095.

[17] Friedenstein v. United States, 125 U. S. 224, 230, 8 S. Ct. 838.

[18] Stecher Lithographic Co. v. Inman, 175 N. Y. 124, 67 N. E. R. 213.

as necessarily to exclude the idea of design or deliberation.[19] A book kept by one who is agent for both plaintiff and defendant is admissible against either.[20]

Therefore it will be seen that the declarations of an agent, *made after the transaction to which they relate is ended,*[21] or *not accompanied by an authorized act,*[22] *or which are beyond the scope of his authority,*[23] are not admissible against the principal. The rule is that, whenever it is proved that a person is the agent of another as to a special matter, or generally, whatever such person says, does or writes in reference to such matter, during the pendency of the transaction to which his agency relates, and in pursuance thereof, is evidence against the principal, but it is not admissible merely as the agent's account of what has passed.[24]

[19] Roberts v. Port Blakeley Mill Co., 30 Wash. 25, 70 Pac. 111.

[20] Copeland v. Boston Dairy Co., 184 Mass. 207, 68 N. E. R. 218.

[21] Jordan v. Stewart, 23 Penn. St. 244; Hadspeth v. Allen, 26 Ind. 165; Levy v. Mitchell, 6 Ark. 138; Brigham v. Carr, 21 Tex. 142; Caldwell v. Garner, 31 Mo. 131; Waterman v. Peet, 11 Ill. 648; Raiford v. French, 11 Rich (S. C.), 367; Craig v. Gilbrath, 47 Me. 416; Austin v. Chittenden, 33 Vt. 553; Keeler v. Salisbury, 33 N. Y. 648.

[22] Turnpike Co. v. Thorpe, 13 Conn. 173.

[23] Wright v. Georgia R. R., etc., Co., 34 Ga. 330.

[24] Langhorn v. Allnutt, 4 Taunt. 519.

Mr. Roscoe, in his Digest of the Law of Evidence, p. 72, illustrates this rule thus:

The declaration of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; but statements made at any other time are not admissible against him. Helyear v. Hawke, 5 Esp. 72. So where the servant of a horsedealer, who was employed to take a horse to the stables of the purchaser, had signed a receipt containing a warranty, this receipt without proof of the servant's authority to give a warranty was rejected in an action against his master. Woodin v. Burford, 2 Cr. & M. 391. An admission by a servant, in a transaction not relating to the business in which he is employed, is not evidence against his master. Thus where a pawnbroker's shopman was heard to state that his master had lent £200 at 5 per cent. on the security of certain plate, this was held inadmissible as against the master. Garth v. Howard, 8 Bing. 451. *But if the statement had been made by him in the course of a transaction in the ordinary course of a pawnbroker's business, it would have been different.* Schumack v. Lock, 10 B. Moo. 39. The letters of an agent to his principal containing a narrative of past transactions in which he had been employer, are not admissible in evidence against the principal. Kahl v. Jansen, 4 Taunt. 565; Fairlie v. Hastings, 10 Ves. 128; Betham v. Benson, Gow. 45. An admission by a person who has generally managed A.'s landed property, and received his rents, is not evidence against A. as to his employer's title, there being no other proof of his agency *ad hoc.* Ley v. Peter, 3 H. & N. 101. So in an action against a surety, the admissions or declarations of the principal, to whom goods have been sent by the plaintiff at the defendant's request, are not evidence against the defendant either as to the receipt of the goods, or as to other facts respecting them. Evans v. Beattie, 5 Esp. 26; Bacon v. Chesney, 1 Stark. 192. But a letter from an agent abroad, stating the receipt of money, coupled with

All the rules applicable in the case of agents are applicable in the case of master and servant, and the admissions of the servant may be said not to be admissible against the master, except when they are made in reference to matters in which the acts of the servant will bind the master, and when they form a part of the *res gestae*.[25] But this class of admissions or declarations is not

the answer of the principal directing the disposition of the money, will be evidence of the receipt by the principal. Coates v. Bainbridge, 5 Bing. 58. The admissions of an undersheriff are evidence against a sheriff, for he is the general agent of the sheriff; Drake v. Sykes, 7 T. R. 117; but not unless they accompany an act done, or they tend to charge himself, he being the real party in the cause. Snowball v. Goodricke, 4 B. & Ad. 541. The admissions of a bailiff are evidence against the sheriff, like the statements of any other agent, only when they form part of the transaction. North v. Miles, 1 Camp. 389. The admissions of a surveyor of a corporation respecting a house belonging to the corporation are evidence against the latter in an action for an injury to the plaintiff's house by works done on the defendant's premises. Peyton v. S. Thomas' Hospital, 3 M. & Ry. 625, n.; and see London, Mayor of, v. Long, 1 Camp. 25; Reg. v. Adderbury, East, 5 Q. & B. 187. Evidence may be given against companies of admissions made by their directors or agents relating to matters within the scope of their authority. Meux's Case, 2 D., M. & G. 522. So a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M., was admitted on behalf of his executors, in proceedings against them. National Exchange Co. of Glasgow v. Drew, 2 Macq. 103. The secretary of a projected company has not, by virtue only of his office, any power to bind the members of the provisional committee by admissions. Burnside v. Dayrell, 3 Exch. 225. In Bruff v. Gt. N. Ry. Co., 1 F. & F. 345, an admission of a secretary of a company as to the receipt of a letter was held not admissible. See, also, Ridley v. Plymouth Banking Co., 2 Exch. 711. The evidence of admission by servants of a railway company as to the cause of the loss, or delay in delivering goods, has been held not admissible. Gt. Western Ry. Co. v. Willis, 18 C. B., N. S. 748; Brewing Co. v. Furness Ry. Co., L. R. Q. B. 468.

[25] Black v. Camden, etc., R. R. Co., 45 Barb. (N. Y.) 40; Weeks v. Barron, 38 Vt. 420; Maury v. Talmadge, 2 McLean (U. S. C. C.), 157.

Thus, where a witness testified that a few days prior to the demand of a chair by the plaintiff, he, at the plaintiff's request, went to the defendant's hotel for the chair, and that while there, but in the absence of the defendant, he asked the defendant's clerk, who had the general supervision and charge of the hotel, if the chair was there, at the defendant's hotel, and the clerk replied that it was, it was held that this was a declaration in respect to matter in regard to which the clerk had full means of knowledge, and tended to show that the chair was at the defendant's hotel when the witness called for it. Weeks v. Barron, 38 Vt. 420. See, *ante*, § 154. So, in an action against a railway company on account of injuries received by the plaintiff's wagon and horses from a collision with the defendant's cars, it was held that statements made at the time by the servant who was driving the plaintiff's wagon, as to the cause of the accident, were admissible as a part of the *res gestae;* Toledo, etc., R. R. Co. v. Goddard, 25 Ind. 185; and the same rule was also applied in an action against a railroad corporation by a passenger for the loss of his trunk, and the admissions of the conductor, baggage-master or station-master, as to the manner of the loss, made in answer to inquiries on behalf of the passenger the next

admissible unless they are a part of the *res gestae,* and if made after the act to which they relate has transpired, so that they cannot be said to be connected with and a part of the act itself, as an half hour,[26] or any other period of time so remote from the principal act that they cannot be said to be a part of it, they are not admissible, except where they are made while still discharging a duty which has been imposed upon him by the master. Admissions made by a director of a corporation in charge of his work as to the work are not admissible when made en route from one place to another while not directly engaged in the business of the corporation.[27] Evidence of a statement made by a foreman after an accident to an employe as to his direction to the employe is not admissible in evidence against the principal, as it is a declaration not made in the course of the agency of the foreman.[28] In an action against a railroad for abusive language used by its brakeman to a passenger, subsequent statements by the brakeman admitting his acts are inadmissible to bind the company.[29] A statement by a superintendent in a mine as to the cause of an accident is inadmissible, not being part of the *res gestae* or binding on the company.[30] Statements of a treasurer of a corporation as to loans of the corporation are not evidence against it when made when he was not acting for it.[31] Where suit is brought on a claim that the defendant has driven the plaintiff's horses out of a pasture so that they were lost, a statement by the defendant's servant while he was driving the horses out of the pasture to the effect that if the horses were found there again they would be scattered so that they would never be found, is not admissible against the defendant. This was not a statement with reference to the act then being done, but declared a purpose to do a similar act in the future in a particular manner, and as such is inadmissible as part of the *res gestae*.[32] Statements by either

morning after the loss, were held admissible against the corporation. Morse v. Connecticut River R. R., 6 Gray (Mass.), 450.

[26] Nashville, etc., R. R. Co. v. Messino, 1 Sneed (Tenn.), 220.

[27] Allington & Curtis Manufacturing Co. v. Detroit Reduction Co., 133 Mich. 427, 95 N. W. 562, 565; See also, Merrow v. Goodrich, 92 Me. 393, 42 A. 797, 68 Am. St. Rep. 512.

[28] Garrick v. Florida, etc., & P. R. Co., 53 S. C. 448, 31 S. E. 224, 324, 69 Am. St. Rep 874.

[29] Illinois Central R. R. Co. v. Winslow (Ky., 1905), 84 S. W. 1175.

[30] Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

[31] Stanton v. Baird Lumber Co., 132 Ala. 635, 32 So. 299.

[32] Waggoner v. Snody, (Tex., 1905), 85 S. W. 1134.

a special or general agent after the close of a transaction, and not part of the *res gestae* are inadmissible against the principal.[33] Admissions by an agent two or three weeks after the completion of the agency are not competent against the principal.[34]

[33] Statement of liability of principal to pay certain bill. Butters Salt & Lumber Co. v. Vogel, 135 Mich. 381, 97 N. W. 757.

[34] Small v. McGovern, 117 Wis. 608, 94 N. W. 651.

Thus, in an action against a railway company to recover damages for running over and killing cattle, statements made by the engineer, some time after the killing, are not admissible. Price v. N. J. Railroad Co., 31 N. J. L. 229; Aldridge v. Midland Blast Furnace Co., 78 Mo. 539. In Hanover Railroad Co. v. Coyle, 55 Penn. St. 402, where a peddler's cart had been overthrown by a railway train, in an action for the injury the plaintiff was permitted to prove the declarations of the engineer at the time of the accident, for the purpose of showing the train was behind time, and thus show carelessness and negligence as a part of the *res gestae*. The supreme court say: "The record shows no bill of exceptions to this evidence; but if it did, we cannot say that the declaration of the engineer was no part of the *res gestae*. It was made at the time of the accident, in view of the goods strewn along the road by the breaking up of the boxes; and it seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the transaction itself." In Luly v. Hudson River Railroad Company, 17 N. Y. 131, where the suit was for alleged negligence in running against the plaintiff, the plaintiff was allowed to prove by a policeman, who was present when the accident occurred, that he, being called on by the crowd then present, arrested the driver of the car, and while getting out of it and out of the crowd, being asked why he did not stop the car, he said that the brake was out of order. And the Court of Appeals reversed the case because this evidence was admitted, holding that this declaration of the driver was not a part of the *res gestae*. It was no part of the driver's act for which the company was sued. The court say: "It was not made at the time of the act so as to give it quality and character. The alleged wrong was complete when he made the statement, and the driver was only endeavoring to account for what he had done." So in Belfontaine Railroad Company v. Hunter, 33 Ind. 335, 5 Am. Rep. 201, the court held that in an action against a railroad company by an administrator to recover damages for the death of his decedent, occasioned by the collision of a locomotive and train of cars and a wagon in which the decedent was crossing the track, the declarations of the fireman employed on the locomotive at the time of the collision, made on the arrival of said train bearing the body of the deceased at a station one mile from the place of the accident, were not admissible as a part of the *res gestae*. And in Lum v. Bryant, 9 Gray (Mass.), 245, in an action to recover damages sustained by a collision between the defendant's and the plaintiff's carriage, evidence that the defendant's servant, who had charge of his carriage, immediately after the collision, and while the defendant was being taken from his carriage, and while the crowd was about, said the plaintiff was not to blame, yet the court held that this declaration of the defendant was not admissible as a part of the *res gestae*. The court say: "It was made after the accident occurred and the injury to the plaintiff's carriage had been done. It did not accompany the principal act or tend in any way to elucidate it. It was only the expression of opinion about a past occurrence and not a part of the

But where the declarations or admissions of an agent relate to

res gestae." It is not more competent because made immediately after the accident than if made a week or a month afterward. Land v. Tyngsborough, 9 Cush. (Mass.) 36. Statements made by the captain of a passenger steamer soon after the injury of a passenger by the lurching of the vessel, that the place was dangerous by reason of the absence of a handrail, and that he could have it remedied, were held inadmissible. American S. S. Co. v. Landreth, 102 Penn. St. 131, 48 Am. Rep. 196. In Packet Co. v. Clough, 20 Wall. (U. S.) 528, the court, in reference to such admission, said: "The captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal or any servant of his principal has been guilty of negligence in receiving them. There is no necessary connection between the admission and the act." And the same is true as to statements made by a conductor, engineer or other employee of a railway company, *after* an accident. Virginia, etc., R. R. Co. v. Sayres, 26 Gratt. (Va.) 351; Robinson v. Fitchburg R. R. Co., 7 Gray (Mass.), 92; Griffin v. Montgomery R. R. Co., 26 Ga. 111; Hawker v. Baltimore, etc., R. R. Co., 15 W. Va. 628, 36 Am. Rep. 825.

In a New York case the defendant agreed to pay to the plaintiff a sum of money, in consideration of the plaintiff suffering his wife to live separate, and delivering to her certain property. In a suit for the money, the wife's declarations that she had received the property were held admissible against the defendant, she being his agent for this purpose, and her receipt was held evidence of the delivery, as also was her parol admission. Fenner v. Lewis, 10 John. (N. Y.) 38, 44, 45.

In a Pennsylvania case, the defendant having written to the plaintiff that he would be accountable with W. for any contract he would make for the purchase of goods, in an action for goods sold to W. it was held that a letter from W. subsequent to the purchase, acknowledging the purchase of goods from the plaintiff, was evidence against the defendant. Meade v. M'Dowell, 5 Binn. (Penn.) 195. Accordingly it is said the letters of an agent cannot be received in evidence to prove facts stated in them. He is a competent witness, and should be sworn to prove these. But his letters may be received to show what facts he has stated in the course of his business as agent, in order to explain upon what motives and principles the party receiving them acted; though the facts stated must be proved otherwise. Blight v. Ashley, 1 Pet. (U. S. C. C.) 15, 21.

In a Connecticut case, in assumpsit for money had and received, the plaintiff offered in evidence what the defendant's agent who received the money said, and it was held that what he said and did in that transaction was the same as said and done by the defendant. Perkins v. Burnet, 2 Root (Conn.), 30. To repel a plea of usury to a promissory note, the plaintiff offered to show what the defendant's son had said while acting as agent in relation to the transaction in question, and it was held admissible. Mather v. Phelps, 2 id. 150. So an entry of deposit by the agent of a bank in a bank-book accompanying the deposit, is a conclusive admission against the bank; otherwise if made afterwards. Manhattan Co. v. Lydig, 4 John. (N. Y.) 389. So the entry in a bank-book of a dealer, of the amount of his deposit, made by a teller or clerk of the bank, is an entry by the bank agent. He is *not the agent of the dealer*, and a mistake may be shown by the latter. Mechanics & Farmers' Bank in the city of Albany v. Smith, 19 John. (N. Y.) 115. So in assumpsit for the price of hides sold by a butcher, against the proprietors of a tan yard, their general manager of the yard, who had power to buy hides and sell leather, gave the plaintiff three certificates of different dates; one that $1,640.75 was due the plaintiff on settlement; one that $2,843.25, and another that $1,297.30 worth of hides had been received by him from such a day to

a matter not within the scope of his authority, they are not ad-

such a day, mentioning the time in each certificate, and signed his name; and these certificates were held admissible to charge the defendants. MARSHALL, Ch. J., said the proprietors themselves might have given such papers, and their general manager had the same power; and the court held all the papers receivable in evidence against the defendants, including that which certified the settlement or balance struck. Barry v. Foyles, 1 Pet. (U. S. C. C.) 311; Rawson v. Adams, 17 John. (N. Y.) 130. So to prove a loss on an adventure shipped to New York, the account of sales by the factor was received in evidence on proving his signature to the account. Rich v. Broadfield, 1 Dall. (U. S.) 16. And the log-book of a ship is evidence for the owner; but it must be proved to have been regularly made. Proof of the mate's handwriting in many parts, and that a sailor saw him writing "log-book of the Lydia," the name of the ship, during the voyage, is not enough. United States v. Mitchell, 2 Wash. (U. S. C. C.) 478. Such strict proof would, of course, not be necessary where it is used against the owner. So the declaration of a sheriff or auctioneer as to what property is up for sale, as whether it be the whole farm or only a certain parcel of it, is admissible. Wright v. Deklyne, 1 Pet. (U. S. C. C.) 199, 201, 204. And in assumpsit for ten kegs of dollars, against a bank, the plaintiff proved that the kegs, being brought to the bank against the plaintiff's will, were paid out for the debts of the bank by the direction of H. and B., president and cashier *pro tempore*. And this was held admissible, though H. and B. were both within reach of a subpœna, because a president and cashier of a bank may direct money in the bank to be paid out for the debts of the institution. But the subsequent admission of the president as to a bag of dollars which had been brought into the bank and converted by a stockholder, that this was the plaintiff's property, was held inadmissible. The City Bank of Baltimore v. Bateman, 7 H. & J. (Md.) 104. So on a libel against goods, as being forfeited by illegal exportation, in a trade with the Indians, the declarations and acts of the exporters' agent, or of any one who acted in conjunction with the exporters in the course of their business, were held admissible as evidence against the goods. American Fur Co. v. United States, 2 Pet. (U. S. C. C.) 358. So, in a statute proceeding to recover for labor done on the respondent's ship, he insisted that the libelant had been paid by a note of W. and C., former owners. The libelant insisted that the note was not paid, but renewed and discounted, the money going to W. and C. A witness for the libelant proved that W. and C.'s clerk came to the libelant, and requested him to renew the note, which he did. Objected that this was hearsay, and that the clerk should be sworn as a witness; but the objection was overruled. The court say, being clerk of W. and C., he was their agent; and his sayings and doings were matters of fact. Ship Portland v. Lewis, 2 S. & R. (Penn.) 197, 203. And though the acts of a deputy surveyor in surveying State lands for A. cannot be given in evidence for him without producing the public authority under which the deputy acted, yet the unauthorized act of the deputy, done or attempted by the procurement of A., may be given in evidence against him. Unger v. Wiggins, 1 Rawle (Penn.), 331. So in an action by the owners of a vessel on a policy of insurance, the protest of the master and mariners is admissible evidence for the plaintiffs, and of course for the defendants, Miller v. S. C. Ins. Co., 2 M'Cord (S. C.), 336; Campbell v. Williamson, 2 Bay, 237, as, for instance, as to the cause of deviation, or the seaworthiness of the vessel. Id. The plaintiff made an agent to receive certain moneys collected for him by the defendant. It was held that the agent's drafts on, and receipts to, the defendant for money, his letters in the course of the business to the defendant, and an account and balance struck between

missible against his principal, although they refer to acts within his authority;[35] and this has been held to be the rule even when the admissions of the agent were contained in a sworn answer to a bill in equity.[36] So the declarations of one employed merely to deliver goods are not admissible in evidence against his principal as to the title to the goods delivered.[37] A bank cashier called as a witness in an action between third parties will not

them in respect to the money, and the agent's admission of payment at the time of so settling, were all evidence for the defendant. The agent need not be made a witness by him. Thallhimer v. Brinkerhoff, 6 Cow. (N. Y.) 90, 99, 100. And see Sherman v. Crosby, 11 John. (N. Y.) 70. So a letter from the debtor's agent (authorized to do the act), directing the creditor on which of several debts to apply certain moneys paid, was held admissible to prove the application of the payment. Mitchell v. Dall, 2 H. & G. (Md.) 159, 170. In a New York case the party had employed Fitch as agent to sell for him a quantity of barilla, who sold part to the defendant, who gave his note. The barilla was in truth worth nothing; and in an action on the note, the defense being that there was fraud, the defendant proved the declarations of Fitch in respect to the quality of the remaining quantity on hand, after the sale to the defendant. The court thought that, as Fitch was agent for selling the whole, his declarations, while engaged in that agency, were admissible against the plaintiff. But the cause went off mainly on another point. Welch v. Carter, 1 Wend. (N. Y.) 185, 190, 191.

In an action for money had and received, it appeared that the defendants' agents had directions to receive the money and remit it to the defendants. A letter from the agents admitting they had received it—that letter being answered by one from the defendants—was therefore received in evidence against the defendants, as a declaration made in the course of their business as agents. The object of the letter was to show the money to be in the hands of the defendants' agents. Coates v. Bainbridge, 5 Bing. 58. In assumpsit on a promise to remove certain mud, which the defendant's foreman had asked leave to throw on plaintiff's land, on cleansing a stream for the benefit of the defendant's mill, the plaintiff offered to prove what the defendant's clerk in his counting-house, and who also had the internal management of the mill, had directed the foreman as to cleaning the stream and taking away the mud. It was held inadmissible. The act of throwing out the mud was not within the ordinary business of the defendant as a miller, and the clerk who managed the mill could not, therefore, interfere. Suppose, said BEST, C. J., the defendant's house had been out of repair, the repairing would not come within the business of the clerk as agent in the counting-room. Shumack v. Lock, 10 B. Moore, 39. In a North Carolina case the acknowledgment of the cashier of a bank, that a note had been paid, was received, and held *prima facie* evidence against the bank. State Bank v. Wilson, 1 Dev. (N. C.) 484. So where the wife of the plaintiff, who was shown to be the plaintiff's agent for the purpose, declared that the demand in question had been sold by her to F., this was held admissible as evidence against the plaintiff, and that any one might safely treat with F. concerning it. Curtis v. Ingham, 2 Vt. 287, 289. In this case the plaintiff had left the State, leaving the whole control of this business with his wife.

[35] Webb v. Alexander, 7 Wend. (N. Y.) 281; Barclay v. Howell, 6 Pet. (U. S.) 404.

[36] Leeds v. Marine Ins. Co., 2 Wheat. (U. S.) 380.

[37] Goltra v. Penlard, 42 Oregon, 18, 77 Pac. 129.

ordinarily be held the agent of the bank, so that his admissions bind it in the absence of peculiar or exceptional circumstances showing him its agent.[38] The declarations of an agent in possession of property simply for the purpose of managing it and caring for it for his principal are not admissible against the principal to show title to the property in another, as the agent had no authority to bind the principal as to title.[39]

[38] Harrison Co. v. State Sav. Bank (Iowa, 1905), 103 N. W. 121.

[39] Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76.

Thus in an action for work and labor, the plaintiff was allowed to prove by D. the declaration of the defendant's agent concerning buildings erected by the plaintiff on the farm of a third person, with whom it did not appear the defendant had any connection. This was left to the jury, with instructions that, if they believed D., they should find for the plaintiff. It was held erroneous, for no connection was shown between the defendant and the third person. Irvine v. Buckaloe, 12 S. & R. (Penn.) 35. In a Virginia case the defendant, by F., his agent, purchased certain trees of the plaintiff's intestate. It was held that a subsequent written account, made by F., of the timber cut under F.'s direction for the defendant, was not admissible in evidence against him. Pasteur v. Parker, 3 Rand. (Va.) 458. So in assumpsit for the price of pig iron, the delivery was sought to be proved by the certificate of the defendant's clerk, dated November, 1815, that the quantity of pig iron delivered to him by the plaintiff in October and November, 1814, was so much. It was held inadmissible, it being a past transaction, and not a receipt given at the time, which, *semble*, would have been evidence. The plaintiff should have sworn the clerk as a witness. Glasser v. Reno, 6 S. & R. (Penn.) 206. Again: In an action for money had and received, the claim arose from the defendant having received money from the treasury for certain rations furnished to the army by one Bradshaw. The plaintiffs claimed that Bradshaw, now deceased, was their agent in furnishing the rations; and the defendant, that he was his agent in furnishing them. The defendant offered in evidence a written statements of facts by Bradshaw, respecting the matter in controversy, made to be submitted to referees in a controversy between himself and one Duncan, and it was held inadmissible. The plaintiffs then offered in evidence Bradshaw's letter denying that the defendant had supplied the rations; but this was in answer to certain declarations of his to the contrary, which the defendant had given in evidence, and it was held admissible only in this point of view, but not as proof of an independent fact. Turnbull v. O'Hare, 4 Yeates (Penn.), 446. In an action for money paid as a premium in effecting an insurance for the defendant, W., as the defendant's agent, requested the plaintiff to insure, and gave to the plaintiff his (W.'s) own note, but failed. The plaintiff offered to prove the subsequent declarations of W., that the defendant would pay the debt, and it was held inadmissible. The reason given is, that W. was agent only to effect the policy, not to bind the defendant by a subsequent promise to pay. Millick v. Peterson, 2 Wash. (U. S. C. C.) 31.

So in ejectment founded on an entry and survey, the admission of the plaintiff's agents and surveyors that they had agreed to a survey which should not interfere with the defendants, was held inadmissible against the plaintiff, not being made in the course of their acts as agents, but afterwards. Meredith v. Kennedy, Litt. Sel. Cas. (Ky.) 516. See M'Cormick v. Barnum, 10 Wend. (N. Y.) 104, and Barclay v. Howell, 6 Pet. (U. S.) 498. But in the New York case the surveyor was dead, and it was a declaration as to boundaries,

Sec. 158. Knowledge of, or Notice to, Agent affects Principal, when.

It is well settled that notice to an agent, actual or implied, relative to a matter affecting his agency and while such agency exists, is notice to the principal, and such is also the rule as to a knowledge of facts relating to the business of his agency, acquired while acting for his principal;[1] and this rule applies with equal

and in the case from Peters, the declarations of the surveyor were while he was acting as such. In trover against four, two of them owners, and two agents of the owners in managing a warehouse, the two agents admitted that they, by the owners' orders, converted the plaintiff's whiskey, which he had at the warehouse; but their admissions were held inadmissible, as they were not made at the time of their doing the acts complained of. Roberts, etc., v. Burks, Litt. Sel. Cas. Ky. 411. In a New York case the plaintiff appointed an agent to settle with and receive money from the defendant for a debt. The defendant, to prove a settlement and payment between him and the agent, offered in evidence an account current, to which the agent had made an affidavit, and it was held not admissible, it being the admission of past acts of the agent, and the admission not within the scope of his authority. Thallhimer v. Brinckerhoff, 4 Wend. (N. Y.) 394. So the declarations of one who had been an agent to make a contract, after he had made it, though he was still an agent to make like contracts for the same party, were held inadmissible to affect his principal in respect to the terms or construction of the former contract; for such were not a part of the *res gestae*. Haven v. Brown, 7 Me. 421.

So the declarations of an agent that he had given license to enter and cut timber are not admissible against his principal, being an admission of what was past. Hubbard v. Elmer, 7 Wend. (N. Y.) 446. The maker gave a proposition for time on his note at the bank to the cashier, who, as he promised, submitted the proposition to the directors, and came and told the maker that the proposition had been accepted. It was proposed to give this in evidence against the bank, the cashier being their general agent, which fact was admitted. But it was held that, notwithstanding, this information was not part of the *res gestae*. He did not himself make the contract for time; it was made by the directors. He merely carried the proposal and brought back the answer; and the information being but hearsay, it was held the agent must be sworn. Grafton Bank v. Woodward, 5 N. H. 301. An agent appointed to superintend the execution of a survey in a suit of chancery has no authority to admit the notoriety of any object whose notoriety may be material in the cause. Robinson v. Morgan, Litt. Sel. Cas. (Ky.) 56. In detinue for the plaintiff's goods, pawned without his authority to the defendant, a pawnbroker, the only evidence to charge the defendant with possession was the admission of the defendant's shopman, made at the house of the plaintiff's attorney, and TINDAL, C. J., delivering the opinion of the court, said if the transaction had been one in the ordinary trade and business of the defendant as a pawnbroker, in which trade the shopman was his agent or servant, a declaration that his master had received the goods might probably have been evidence, as it might be held within the scope of the shopman's authority to give an answer to an inquiry made by any person interested in goods deposited with the pawnbroker. But he said this deposit was an ordinary loan at five per cent., out of his line as pawnbroker, a case in respect to which the shopman had no authority.

[1] Wood on Railways, 457; Walker v. Ayers, 1 Iowa 449; Astor v. Wells, 4

force where a person in the first instance assumed to act for another without authority, but whose act in that respect was ratified by the principal—the rule being that if he takes the benefit of the act, he must take it charged with notice of such matters as were at the time within the knowledge of the agent.[2] But in order to impute the knowledge of the agent to the principal, *it must be shown that he acquired the knowledge while acting as such agent; and it must relate to the business of his agency.*[3]

Upon this proposition the authorities are by no means uniform, and many respectable decisions are to be found sustaining both the affirmative and the negative; but it seems to us that as the rule in either view is arbitrary, and as the notice at best is only constructive, *and may never in fact have been given to the principal, it should be restricted to such notice and knowledge of facts as is received by the officer or agent, not only at a time when he was an officer or an agent, but also when he was acting as such,* and that the rule which is adopted in some of the cases,[4]—that the

Wheat. (U. S.) 466; Reed's Appeal, 34 Penn. St. 207; Hough v. Richardson, 3 Story (U. S. C. C.) 659; Sutton v. Dillaye, 3 Barb. (N. Y.) 529; Varnum v. Milford, 4 McLean (U. S. C. C.) 93; Patten v. Merchants', etc., Ins. Co., 40 N. H. 375; Wiley v. Knight, 27 Ala. 336; Keenan v. Missouri Ins. Co., 12 Iowa, 126; Ingalls v. Morgan, 10 N. Y. 178; Felter v. Field, 1 La. An. 80; Mundine v. Pitts, 14 Ala. 84; Smyth v. Oliver, 31 id. 39; Page v. Brunt, 18 Ill. 37; Musser v. Hyde, 2 W. & S. (Penn.) 314; Fowler v. Halbert, 4 Bibb (Ky.) 52; Boyd v. Vanderkamp, 1 Barb. (N. Y.) Ch. 273; Owens v. Roberts, 46 Wis. 258; Pepper v. George, 51 Ala. 190; Rouch v. Karr, 18 Kan. 329; Allen v. Poole, 54 Miss. 323; Saulsbury v. Wimberley, 60 Ga. 78; Campau v. Konan, 39 Mich. 362; Hier v. Odell, 18 Hun (N. Y.) 314; Sooy v. State, 41 N. J. L. 394.

[2] Hovey v. Blanchard, 13 N. H. 145.

[3] Brown v. Bankers, etc., Tel Co., 30 Md. 39. See cases cited *post*, n., p.

[4] Fairfield Savings Bank v. Chase, 72 Me. 226; Distilled Spirits, 11 Wall. (U. S.) 356; Lebanon Savings Bank v. Hallenback, 29 Minn. 322; Dresser v. Norwood, 17 C. B. N. S. 466; Ingalls v. Morgan, 10 N. Y. 178; Hovey v. Blanchard, 13 N. H. 145; Choteau v. Allen, 70 Mo. 290. But see Ford v. French, 72 id. 250; First National Bank of Highstown v. Christopher, 41 N. J. L. 435; 29 Am. Rep. 262. A distinction has been taken between knowledge of illegality or want of consideration of a note by a director who acts with the board in discounting it, and such knowledge on the part of a director who is not present and acting with the board when the discount is made. In the former case it has been held that the bank is bound by his knowledge; in the latter it is not. Bank of the United States v. Davis, 2 Hill (N. Y.) 451; North River Bank v. Aymar, 3 id. 262; National Security Bank v. Cushman, 121 Mass. 490; Farmers', etc., Bank v. Payne, 25 Conn. 444; Farrell Foundry v. Dart, 26 id. 376; National Bank v. Norton, 1 Hill (N. Y.) 572; Washington Bank v. Lewis, 22 Pick. 24; The President, etc., v. Cornen, 37 N. Y. 320; 2 eal. Cas. in Eq. 171, note to Le Neve v. Le Neve. The question how far the knowledge of an officer of a corporation, which he acquired outside of the business of the company, and which was not, in fact, communicated to the corporation, is binding upon it, when it relates to dealings be-

question as to whether such notice or knowledge, received by an agent before he was appointed as such, shall be imputable to the principal, depends upon the circumstance *whether the fact was present in the mind of the agent* when acting for the principal, so fully that he could not have forgotten it—is both unreasonable and unjust. In these cases, the court seems to lose sight of the consequences of such a rule, and also of the circumstance that, while the rule relative to such knowledge of an agent rests upon a presumption that the agent would do his duty and disclose the facts to his principal, yet the presumption is irrebutable, and the principal is not permitted to show that the agent did not in fact discharge his duty.

This rule opens up a new field of inquiry in such cases, which is one of fact, to wit, whether the fact sought to be imputed to the principal *was in the mind of the agent at the time of the transaction in reference to which it should be disclosed.* Who should determine this fact? If, however, as seems probable from the qualification of the rule by the courts—to the effect that the knowledge must be so fully present to the mind of the agent when acting for the principal *that he could not have forgotten it*—it is intended that the presumption shall be irrebutable, then the

tween the officer and the corporation, was considered by the chancellor in Barnes v. Trenton Gaslight Co., 27 N. J. Eq. 33. The bill was filed to set aside a conveyance made by executors in fraud of the powers contained in the will. The conveyance was made to Mr. Potts, who was the legal adviser of the executors, and also president of the gaslight company. Potts conveyed directly to the company, and the bill charged notice on the defendants solely on the ground that at the time of the conveyance to the company Mr. Potts was its president. On demurrer, it was held that the information which came to Mr. Potts' knowledge, as counsel of the executors, was not constructively notice to the corporation, and that the company was a *bona fide* purchaser without notice. In Choteau v. Allen, *ante*, it was held that the principal is affected with knowledge of such facts by the agent as the agent had acquired previously to the agency, *and which he had in mind* at the time of the transaction for the principal. But in Ford v. French, *ante*, it was held that knowledge of facts acquired by an attorney in *one* case could not be imputed to his client in another case. In Yenger v. Banz, 56 Iowa 77, it was held that the principal is not affected by information imparted to his agent before the agency existed, which has not been retained in mind by the agent. It will be seen that in all these cases the doctrine is predicated upon a doubtful presumption that the agent, by reason of the shortness of the time which has elapsed since the information was received, retained it in mind at the time of the transaction for the principal. But the trouble with the rule is, that while the presumption upon which it rests is doubtful, it is nevertheless irrebuttable, and precludes all testimony to show that the agent *did not have* the knowledge in mind, and that he did not in fact communicate it to the principal. DEPUE, J., in First National Bank v. Christopher, *ante*.

harshness and absurdity of the rule is still more glaring. Now, who has the power to say what the capacity of the agent's memory is? It is a matter demonstrated by universal experience that the powers of memory vary greatly in different persons, and while one person will remember even trifling circumstances for a long period, yet other equally competent persons will forget the most important facts within a few hours. So, too, it is well understood that circumstances may exist at the time of a transaction which suppress the remembrance of important facts connected therewith, until it is too late to make use of them. There is not probably a business man who has not had the truth of this proposition demonstrated in his own experience; consequently, as there is and can be no presumption that a person carries in his mind for any considerable period a recollection of every circumstance that he has had an acquaintance with, there is no reason for the doctrine referred to. This being so, it seems to us that the only reasonable and just rule in reference to imputing the knowledge of an agent to his principal, is that which is so universally adopted, confining it to knowledge of facts relating to the agency, and acquired at a time when he was discharging the duties of his agency.[5] In England the rule is now as stated in the Maine

[5] Astor v. Wills, 4 Wheat. (U. S.) 466; Reed's Appeal, 34 Penn. St. 207; Walker v. Ayers, 1 Iowa 449; Hough v. Richardson, 3 Story (U. S.) 659; Sutton v. Dillaye, 3 Barb. (N. Y.) 529; Wiley v. Knight, 27 Ala. 336; Keenan v. Missouri Ins. Co., 12 Iowa 126. In Mundine v. Pitts, 14 Ala. 84, the court held that notice to an agent or counsel when he is engaged in another business at another time will not be constructive notice to his principal or client *employing him afterwards*. See, also, to the same effect, Pepper v. George, 51 Ala. 190; Plympton v. Preston, 4 La. An. 356; Musser v. Hyde, 2 W. & S. (Penn.) 314; Bracken v. Miller, 4 id. 102; Bank of United States v. Davis, 2 Hill (N. Y.) 452; New York Central Ins. Co. v. Protection Ins. Co., 20 Barb. (N. Y.) 468; United States Ins. Co. v. Shriver, 3 Md. Ch. 381; Miller v. Illinois Central R. R. Co., 24 Barb. (N. Y.) 312; Winchester v. Baltimore, etc., R. R. Co., 4 Md. 231; General Ins. Co. of Maryland v. United States Ins. Co. of Baltimore, 10 Md. 517; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270; Washington Bank v. Lewis, 22 id. 24. In McComb v. Chicago, etc., R. R. Co., 7 Fed. Rep., it was held that an officer of a corporation cannot be made a party to a bill of discovery when he did not derive the information in his official capacity. In National Bank v. Norton, 1 Hill (N. Y.) 572, it was held that notice of dissolution of a partnership, published in a newspaper, and thus accidentally reaching one of several directors of a bank, is not equivalent to actual notice to the bank. COWEN, J., said: "He happened to know the fact of dissolution, as a director or other corporator may do, without perhaps being aware that the bank could be prejudiced by it. Not having any intimation that it was material, it is too much, even if the point were in the case, to insist on a presumption that he ever communicated the fact to the board. Not having acquired the knowledge as director, there is no

case; *but clear and satisfactory proof is required that the facts were so present in the agent's mind.* How is the fact to be established? If by the oath of the agent, and he states that the fact *was present in his mind,* but that he did not communicate it to the principal, then the principal is made to suffer for the negligence or

room for presumption either on the ground of duty or intent." In Bank of United States v. Davis, 2 Hill (N. Y.) 451, where a bill of exchange was sent to a director of a bank to be discounted for the benefit of the drawer, and the former, who was a member of the board who ordered the discount to be made, received the avails, alleging that the discount was for his own benefit, it was held that the bank was chargeable with knowledge of the fraud. The court said: "The general rule is undisputed that notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is acting for the principal in the course of the very transaction which becomes the subject of the suit; for upon principles of general policy it must be taken for granted that the principal knows whatever the agent knows." "I agree that notice to a director, or knowledge derived by him while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. This is clear from the ground and reason upon which the doctrine of notice to the principal through the agent rests. The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions." North River Bank v. Aymar, Hill (N. Y.) 262, 275; Fulton Bank v. New York & Sharon Canal Co., 4 Paige Ch. (N. Y.) 127. In La Farge Ins. Co. v. Bell, 22 Barb. (N. Y.) 54, it was held that an insurance company taking mortgages subsequent in date to an unrecorded deed of the same premises is not chargeable with constructive notice of such deed from the fact that the grantor and mortgagor was at the date of both deed and mortgage a director in the insurance company. The court said: "If his position as a director could make him the agent, or rather identify him entirely with the plaintiffs in such sort as to charge them with constructive notice of all the facts with which he was personally acquainted, as to the title to lands in which they had any interest, in any case, it cannot be so when he did not become concerned as their especial or transact business in their behalf. Most clearly it cannot be the case where the facts concerned his own private affairs, and the transaction was one in which he was dealing with the company as a third party on his own behalf, and acting for himself with and against them." In General Ins. Co. v. United States Ins. Co., 10 Md. 517, it was held that notice given to a director of a corporation, privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the board, will not bind the corporation. In Farmers and Citizens' Bank v. Payne, 25 Conn. 444, it was held that the knowledge of a bank director, as to the object for which commercial paper was delivered to a party offering it to the bank for discount, the director not being present when it was offered and discounted, and not having communicated his knowledge to any other director or officer, was not notice to the bank. The court said: "The general rule on this subject is that notice of a fact to an agent is notice to the principal if the agent has knowledge of it while he is acting for the principal in the course of the transaction which is in question. And this rule is applicable equally to corporations and natural persons. Hence, knowledge of a material fact, imparted by a director of a bank to the board of directors at a regular meeting of them, is obviously notice

fraud of his agent as to matters occurring before his agency commenced, and when he had no possible reason to apprehend such consequences, and when there is no possible way of evading them. This rule would make it exceedingly dangerous for corporations or individuals to employ agents at all, and in this country, at

to the bank. It has also been decided in some cases, that notice to either of the directors, while engaged in the business of the bank, is notice to the bank. Whether, however, the knowledge of a director who is present at a meeting of a board of directors when paper is discounted, on his application and for his benefit, is, under the rule which has been stated, to be imputed to the bank, is a question on which there is a diversity of opinion, but one which it is unnecessary here to determine. Whether such knowledge should be treated as notice to the bank in that case would probably depend on the question whether the director should be deemed to have been acting as a director and in behalf of the bank when the transaction took place." In Farrell Foundry v. Dart, 26 id. 376, where a defective deed had been recorded, and a director of a corporation not acting as an agent thereof, and having no management of its business otherwise than as director, went to the town records to ascertain the situation of the land, and there saw the record of the deed, but did not inform the corporation or any of its agents, it was held that the corporation was not by reason of these facts chargeable with knowledge of the deed. Louisiana State Bank v. Senecal, 13 La. 525. In Housatonic Bank v. Martin, 1 Met. (Mass.) 294, it was held that knowledge of facts by a mere stockholder in an incorporated manufacturing company or bank is not notice to the corporation of the existence of those facts. In Smith v. South Royalton Bank, 32 Vt. 341, it was held that if a bank director acts in behalf of the bank in a transaction of which the bank takes the benefit, notice to the director at the time of any fact material to the transaction is notice to the bank. In Houseman v. Girard Mut. B. & L. Association, 81 Penn. St. 256, L., desiring a loan from plaintiffs, to be secured by mortgage on his property, plaintiffs' conveyancer ordered searches for liens; through L. he procured a certificate from the recorder that there were no mortgages on the property; on this the loan was made. There being prior mortgages given by L., not certified, on the sale of L.'s property by the sheriff the proceeds did not reach to pay the loan. It was held that the recorder was liable to the plaintiffs for the loss, and the employment of L. to procure the certificate did not affect the plaintiffs with his knowledge. The court said: "It is urged that by the employment of the owner as the agent for this purpose the defendants are affected with this knowledge of the existence of the mortgage which was omitted in the certificate. This is a very familiar principle and well settled. But it is equally well settled that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed. This limitation of the rule is perfectly well established by our own cases, and it is not necessary to look further. Hood v. Fahnestock, 8 Watts (Penn.) 489; Bracken v. Miller, 4 W. & S. (Penn.) 110; Martin v. Jackson, 27 Penn. St. 508. It is a mistake to suppose that it depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men. But the true reason of the limitation is a technical one, that it is only during the agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commences is no more notice than twenty-

least, it has no considerable foothold, and in England the contrary rule was held by its ablest judges.

four hours after it had ceased would be. Knowledge can be no better than direct actual notice. It was incumbent on the plaintiff to show that the knowledge of the agent, to use the accurate language of one of our cases, 'was gained in the transaction in which he was employed.' There was not only no evidence of this offer by the plaintiff, but it was plain that it had been gained before, and in an entirely different transaction." See, also, Farrington v. Woodward, 82 id. 259. In Willis v. Vallette, 4 Met. (Ky.) 186, it was held that notice to an agent is constructive notice to his principal only when acquired in the course of the transaction in which he is acting as agent. To the same effect, Howard Ins. Co. v. Halsey, 8 N. Y. 271. In McCormick v. Wheeler, 36 Ill. 114, it was held that a party cannot be charged with notice of facts within the knowledge of his attorney, of which the latter acquired knowledge while acting as attorney for another person. The court said: "The English courts have recently manifested a disposition to depart from this rule, but we deem it a principle just in itself, and founded on wise considerations of policy." In Ford v. French, 72 Mo. 250, it was briefly held that the knowledge acquired by an attorney while acting for one client will not affect another client, for whom he is acting at the same time in a different case. But on the other hand: In Donald v. Beals, 57 Cal. 399, two mortgages, one to D. and one to N., were deposited in a county clerk's office for record, April 15, the one to D. at four o'clock, and the one to N. at five o'clock. By a clerical mistake it was noted on the D. mortgage that it was deposited on April 18. This mistake occurred in the record book and in the certificate annexed to the mortgage. N. sold and assigned her mortgage to C., who employed an attorney to examine as to the character of the security. C. did not examine the record, but his attorney had full knowledge that the mortgage to N. was not prior in record. The attorney acted both for C. and N. It was held that his knowledge was imputable to C. Said the court: "The knowledge of an attorney is the imputed knowledge of his client. It is a well-settled doctrine of English law, that if the agent, at the time of effecting a purchase, have knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby,"—citing Distilled Spirits, 11 Wall. (U. S.) 367. As to the question of notification to a corporation through an agent, the American cases are as follows: In Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, it was held that the circumstance that the indorser of a discounted note was a director of the discounting bank, is not constructive notice to the bank that the note was made for his accommodation. In Washington Bank v. Lewis, 22 id. 24, a bank director got possession of a note for discount for the owner, and instead he pledged it to the bank for his own debt. It was held that as he did not act in his capacity of director in procuring the discount, the bank was not affected by his knowledge of the circumstances under which he procured it. The court said: "The argument is, that though Thompson was not the agent of the bank, yet as he was a director, his knowledge of the facts under which the note was procured is the knowledge of the bank. If this argument could be maintained, it would follow that if a director should procure a note to be discounted, by the fraudulent concealment of material facts which he was bound to disclose, or even by false pretenses, the bank would have no remedy. If Thompson had been authorized to discount this note, and did discount it, the argument might hold good. Whatever a director or other agent of a bank may do within the scope of his authority, would bind the bank so as to make them responsible to the person dealt with. But in the present case Thompson was the party apply-

"Where the counsel comes to have notice of the title in another affair," says the Lord KEEPER,[6] " . . . that shall not be such a notice as to bind the party." "If a counsel or attorney," says Lord HARDWICKE,[7] "is employed to look over a title, and by some other transaction foreign to the business in hand has notice, this shall not effect the purchaser; for if this was not the rule of the court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more likely than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind." In the case previously cited from the United States Supreme Court,[8] which seems to be the authority upon which the courts of this country which have adopted this doctrine predicate it,—the court did not undertake to support its position by any line of reasoning, but was satisfied to accept it simply because the English courts had adopted it, which is hardly sufficient to commend the doctrine to the better class of our courts.

Sec. 159. Admissions by Guardians, Nominal Parties to the Record, Executors, Etc.

While admissions made by a party to a suit *in interest* are receivable in evidence against him, yet admissions made by a merely *nominal* party are not admissible. So an unauthorized admission of a trustee for bondholders does not bind the bondholders,[1] and guardians of minors cannot make admissions against the in-

ing for the discount, and was not acting as director, nor could he with propriety so act. The courts in this country which have adopted the rule that a principal shall be charged with knowledge of facts obtained by an agent *before* he entered upon his agency, are few, and the reasons given by them for this extraordinary doctrine are not such as will be likely to commend them to other courts." Tagge v. Tennessee National Bank, 9 Heisk. (Tenn.) 479; Hart v. Farmers' Bank, 33 Vt. 252; Fairfield Savings Bank v. Chase, 72 Me. 226; Distilled Spirits, 11 Wall. (U. S.) 356. Some Massachusetts cases are sometimes cited as sustaining this rule, but upon examination it will be seen that the knowledge imputed to the principal was acquired by the agent during his agency. Security Bank v. Cushman, 121 Mass. 490; Lunt v. Woodhall, 113 Mass. 391.

[6] Preston v. Tubbin, 1 Vern. 287.

[7] Lowther v. Carlton, 2 Atk. 242. See, also, Warrick v. Warrick, 3 Atk. 294, Le Neve v. Le Neve, 3 id. 646; Street v. Whittaker, Barnard, 220; Cross v. Smith, 1 M. & S. 545; Hein v. Mill, 13 Ves. 113; Mountford v. Scott, 3 Madd. 34. But in this case, upon appeal, Lord ELDON made an intimation of a possible exception to this rule, foreshadowing the doctrine we have combated in the text, which has lately been seized upon by the English courts as a pretext for adopting the rule so foreshadowed by him.

[8] Distilled Spirits, *ante*.

[1] Unity Co. v. Equitable Trust Co., 204 Ill. 595, 68 N. E. R. 654.

terests of their wards.[2] Thus, if the assignee of a bond sues the obligor in the name of the original obligee, or if a *cestui que trust* brings an action in the name of his trustee, or if the assignee of any chose in action brings suit thereon in the name of the assignor, as the plaintiff is only nominally so, the real plaintiff is not bound by his admissions, and they are not admissible in evidence against him.[3] And even though a receipt has been given by

[2] Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. R. 1066, where guardian stated that holder of insurance policy of which his wards were beneficiaries, committed suicide. Proofs of death made by a guardian for beneficiaries in a life insurance policy are not admissible against his wards in an action on the policy. Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862.

[3] Bent v. McKinstry, 4 Minn. 204; Wynne v. Glidwell, 17 Ind. 446; Bates v. Ableman, 13 Wis. 644; Myers v. McKenzie, 26 Ill. 26; Frear v. Evertson, 20 John. (N. Y.) 142; Canton v. Baldwin, 27 Tex. 572; Lewis v. Long, 3 Munf. (Va.) 136; Peck v. Crouse, 46 Barb. (N. Y.) 151; Bartlett v. Marshall, 2 Bibb (Ky.) 470; Heywood v. Reed, 4 Gray (Mass.) 574; Scott v. Hall, 6 B. Mon. (Ky.) 285; Palmer v. Cassin, 2 Cranch C. Ct. 66; State v. Jennings, 10 Ark. 428; Patrick v. McWilliams, 23 Ga. 348; Scott v. Coleman, 5 Litt. (Ky.) 349; Gillighan v. Tebbetts, 33 Me. 360; Cooke v. Cooke, 29 Md. 538; Tapley v. Forbes, 2 Allen (Mass.), 20; Wing v. Bishop, 3 id. 456; Garland v. Harrison, 17 Mo. 282; Norton v. Woods, 5 Paige (N. Y.), 249; Hanna v. Curtis, 1 Barb. (N. Y.) Ch. 263; Wilson v. Hanson, 20 N. H. 375; Burroughs v. Jenkins, Phill. (N. C.) Eq. 33. The admissions by the assignor of a chose in action, made while he is the owner thereof and before assignment, are evidence against his assignee and all claiming under him. Brown v. McGraw, 20 Miss. 267; Gallagher v. Williamson, 23 Cal. 331. Where an assignment for the benefit of creditors is attacked as fraudulent, it is competent for the creditors attacking it to prove the declarations of the assignor, made after the assignment was delivered, but before the schedules were made out and attached, and while the assignor was engaged in preparing them. Wyckoff v. Carr, 8 Mich. 44. The admissions of an insolvent debtor after the sale of his property by the trustee or mortgagee are inadmissible to impeach the title of the purchaser, unless it is shown affirmatively that they were assented to by him, or made in his presence without objection on his part. Sutter v. Lackmann, 39 Mo. 91; Johnson v. Holdsworth, 4 Dowl. 63; Payne v. Rogers, 1 Doug. 407; Manning v. Cox, 7 Moore. 617; Innell v. Newman, 4 B. & Ald. 419; Hickey v. Burt, 7 Taunt. 48; Manutstephen v. Brooke, 1 Chitty, 390; Legh v. Legh, 1 B. & P. 447. The rule was formerly otherwise in England. Bauerman v. Rodenius, 7 T. R. 659; Crails v. D'Eth, 7 T. R. 666, n. *b*; and in some of our courts. Plant v. McEwen, 4 Conn. 544; Bulkley v. Landon, 3 Conn. 76. This rule was predicated upon the ground that, a chose in action not being assignable so as to enable the assignee to sue thereon in his own name, he is bound by the acts and sayings of the assignor. But a contrary view prevails in this country, and the assignee is protected against any dealing between the debtor and assignor, after notice to the former, or any set-off acquired after such notice, though not before, will be found to prevail to its fullest extent, being in some of the States partially sanctioned by statute as well as the authority of their courts. Welch v. Mandeville, 1 Wheat. (U. S.) 233; Mandeville v. Welch, 5 id. 277; Corser v. Craig, 1 Wash. (U. S. C. C.) 424; Bholen v. Cleveland, 5 Mas (U. S. C. C.) 174; Green v. Darling,

the nominal plaintiff, the parties may show that the money has never in fact been paid;[4] or if in fact paid, that it was paid *after* the assignment.[5] The same rules prevail as to a *prochein ami* or guardian,[6] unless made in good faith, in a pending suit, for the purpose of the trial only, in which case their admissions are binding upon the same principle that the admissions of an attorney would be.

Admissions made by the representative of an estate will bind him in any suit against him in his representative capacity,[7] but they are not evidence against his co-administrators,[8] nor against a special administrator.[9] Where they relate to acts done by him, or of which he has full control in his representative capacity, which become material to be shown they may be shown to affect the estate; but as a rule, where they relate to matters in which he had no part, they cannot be shown to affect the estate, even when made in a bill in equity.[10] But the declarations of an executor, a party to the

5 Mas. (U. S. C. C.) 201; Wistar v. Walker, 2 Browne (Penn.), 166; McCullum v. Coxe, 1 Dall. (U. S.) 139; Field v. Biddle, 2 Dall. (U. S.) 172, note; Steele v. The Phoenix Ins. Co., 3 Binn. (Penn.) 306; Canby v. Ridgway, 1 Binn. (Penn.) 496; Wheeler v. Hughes, 1 Dall. (U. S.) 23; Ingles v. Ingles' Ex'rs, 2 Dall. (U. S.) 49; Rundle v. Ettwein, 2 Yeates (Penn.), 23; Solomon v. Kimmel, 5 Binn. (Penn.) 232; Bury v. Hartman, 4 Serg. & Rawle, 177; Brindle v. McIlvaine, 9 Serg. & Rawle, 72; Buchanan v. Taylor, Addis. (Penn.) 155; Aldricks v. Higgins, 16 Serg. & Rawle, 212; Boulden v. Hebel, 17 Serg. & Rawle, 312; Metzgar v. Metzgar, 1 Rawle (Penn.), 227; Stevens v. Stevens, Ashm. (Penn.) 190; Perkins v. Parker, 1 Mass. 117; Andrews v. Herring, 5 Mass. 210; Boylston v. Boylston, 8 Mass. 465; Dawes v. Boylston, 9 Mass. 337; Crocker v. Whitney, 10 Mass. 316; Jones v. Witter, 13 Mass. 304; Sergent v. Essex Ry. Corp., 9 Pick. (Mass.) 202; Farr v. Hemmingway, 2 Const. Rep. (S. C.) 753; Wadsworth v. Griswold, 1 Harp. (S. C.) 17; Stoney v. McNeil, 1 Harp. (S. C.) 156; Smith v. Lyons, 1 Harp. (S. C.) 334; Ware v. Key, 2 McCord (S. C.), 373; Strong v. Strong, 2 Aik. (Vt.) 373; Lampson v. Fletcher, 1 Vt. 168; Tichout v. Cilly, 3 Vt. 415; Clark v. Rogers, 2 Me. 143; Robbins v. Bacon, 3 id. 346.

[4] Wallace v. Kelsall, 7 M. & W. 273.

[5] Mandeville v. Welch, 5 Wheat. (U. S.) 277; Welch v. Mandeville, 1 Wheat. (U. S.) 233.

[6] Because they are officers of the court appointed to look after the interests of the ward. Sinclair v. Sinclar, 13 M. & W. 640; Webb v. Smith, Ry. & M. 106; Cowling v. Ely, 2 Starkie, 366; Morgan v. Thorne, 7 M. & W. 408.

[7] Heywood v. Heywood, 10 Allen (Mass.), 105; Emerson v. Emerson, 16 Mass. 429; Wilson v. Terry, 9 Allen (Mass.), 214; Haleyburton v. Kershaw, 3 Dessau. (S. C.) 105; Allen v. Allen, 26 Mo. 327.

[8] Walkup v. Pratt, 5 H. & J. (Md.) 53.

[9] Rush v. Peacock, 2 M. & R. 162.

[10] Fellows v. Fellows, 37 N. H. 75; Crandall v. Gallup, 12 Conn. 365;

record, who is also a legatee under the will, may go to the jury upon the trial of a *caveat* to the will;[11] but if he has no interest under the will, his declarations are not admissible upon the question of its validity.[12] The declarations or admissions of the decedent are, in a proper case, admissible against the estate,[13] but not for it, unless they form a part of the *res gestae*.[14]

Sec. 160. Admissions by Privies. (For recent cases relating to declarations by owners of real estate binding their successors see *ante* Sec. 138.

Where there is a privity of interest between parties, the admissions of one are, in a proper case, evidence against the other, and where there is a mutual or successive relationship to the same right between the parties, there is a privity of interest, and these are classified as privies in estate, in blood, by law, and by representation. Privity of estate exists where the parties are identified in interest as lessors and lessees, donors and donees, joint tenants, etc., and the rule admitting the admissions of one privy in estate against another, is never extended beyond this identity of interest. Privies in blood embrace heirs, ancestors, and coparceners. Privies by representation comprise executors and testators and administrators and intestates. Privity in law arises where the law, without privity of blood, takes an estate from one and bestows it on another.[1] The rules admitting this class of evidence are analogous to those which are found in the doctrine of estoppels, and which govern the admissibility of verdicts, judgments, and depositions. Thus, as to privies in blood and privies in law, the declarations of a deceased occupier of land, that he rented it under a certain person, are evidence of that person's seizin against a party claiming as the heir-at-law of such occupier, to explain the nature of the occupation, and to show that

Elwood v. Diefendorf, 5 Barb. (N. Y.) 398; Dent v. Dent, 3 Gill. (Md.) 482; Marshall v. Adams, 11 Ill. 37.

[11] Williamson v. Nabers, 14 Ga. 286; Peeples v. Stevens, 8 Rich. (S. C.) 398.

[12] Roberts v. Trewick, 13 Ala. 68. And see *ante* p. 499, notes 12-14.

[13] Hale v. Monroe, 28 Md. 98; Malann v. Ammon, 1 Grant (Penn.), 126; Boone v. Thompson, 17 Tex. 605; Gardner v. Heffley, 49 Penn. St. 163; Burckmyer v. Mairs, Riley (S. C.), 208.

[14] Cramer v. Pinckney, 3 Barb. (N. Y.) Ch. 466; Wilson v. Wilson, 6 Mich. 9; Perry v. Roberts, 17 Mo. 36; Whitfield v. Whitfield, 40 Miss. 352.

[1] Co. Litt. 271 *a;* Beverly's Case, 4 Coke, 123; Carver v. Jackson, 4 Pet. (U. S.) 183.

it was not adverse.[2] The declarations of an intestate are evidence against his administrator.[3] But in an action by a special administrator, appointed during the absence from the country of the executor named in the will,[4] it was held that the declarations of the latter, made by him while he was the acting executor, were not admissible against the plaintiff.[5]

In reference to admissions made by persons who have been privies in estate with those against whom the admissions are used, the evidence, after their decease, is generally admissible on a different principle, as being a declaration against interest. And when the persons are alive, the evidence may be admissible in some cases, as explanatory of acts done or forborne, or of the fact of possession. But without reference to either of these principles, it would seem that an admission by a proprietor or occupier possessing any interest would be evidence as to the nature and extent of that interest, against a party who was in privity of estate with him.[6] An answer in chancery is admissible in evidence against a privy in estate,[7] and a statement in a lease by a landlord has been held admissible against a person who claims under a subsequent lease of the same land.[8]

An admission by a tenant in possession, who is defendant in an action of ejectment, is evidence against a co-defendant, who defends as a landlord.[9]

But is seems that the mere declarations of tenants will not in

[2] Human v. Pettett, 3 B. & A. 223; Peaceable v. Watson, 4 Taunt. 16; Bagaley v. Jones, 1 Camp. 367. These points are illustrated by the doctrine concerning the admissibility of verdicts against privies in law and in blood. Locke v. Norbonne, 3 Mod. 141; Outram v. Morewood, 3 East, 346; Co. Litt. 352 *a;* Com. Dig. tit. Estoppel, B; 3 T. R. 365.

[3] Smith v. Smith, 3 N. C. 32. The plaintiff was regarded as claiming under the intestate, though, in fact, he need not have done so. See, also, Humphreys v. Boyce, 1 Mo. & R. 140; Jones v. Jones, 21 N. H. 219; Smith v. Morgan, 8 Gill (Md.), 133; Harvey v. Anderson, 12 Geo. 69; Colgan v. Philips, 7 Rich. (S. C.) 3. See Brown v. Mailler, 14 N. Y. 118.

[4] Taynton v. Hannay, 3 B. & P. 26.

[5] Rush v. Peacock, 2 Mo. & R. 162.

[6] Manton v. Thrupp, 9 Bing. 41; Walker v. Broadstock, 1 Esp. 458; Davies v. Pierce, 2 T. R. 53; Doe v. Rickerby, 5 Esp. 4; Tindal v. Whitrow, 1 C. & P. 22; Pritchard v. Jauncey, 8 C. & P. 99.

[7] Sussex v. Temple, Ld. Raym. 310. In this case the court went too far in determining that the answer might be read against persons in occupation of property, on proof that it was the reputation of the county that the lands had belonged to the person making the answer.

[8] Crease v. Barrett, 1 C., M. & R. 932; Strode v. Seaton, 2 Ad. & El. 171.

[9] Mee v. Litherland, 4 Ad. & El. 384.

general be evidence against their reversioners,[10] and the declarations of a former occupier of the defendant's land have been held not to be admissible against the defendant, upon a question whether the plaintiff had an easement in the land.[11]

Although ancient books of survey and ancient maps, when they are not in the nature of public documents, have been in some cases considered as not being legitimate evidence of boundary, even where they might seem upon principle to be receivable upon the ground that the boundary was a matter of public interest and concern; yet this species of evidence is frequently available by way of admission, where there is a privity of estate between the person against whom the survey or map is used and the person directing it to be made. Thus it was held by HOLT, C. J., that if A. be seized of the manors of B. and C., and during his seizin of both he causes a survey to be taken of the manor of B., and afterwards the manor of B. is conveyed to E., and afterwards there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence.[12]

But as a person cannot be regarded a privy in estate with a subsequent possessor of the estate, except during the time when the estate was in his own possession, it has been held that an answer in chancery, respecting the title to an advowson, filed by one who had been formerly seized of the advowson, but who had conveyed it away twenty years before the answer, was not admissible against a person claiming the advowson through him.[13] And admissions by a mortgagor, made after he had parted with his interest by a settlement, have been held not to be admissible on behalf of a mortgagee, to show that the money had actually been advanced on the mortgage, the mortgagee seeking to avoid the settlement as being voluntary.[14]

[10] By PATTERSON, J., in Tickle v. Brown, 4 Ad. & El. 378.

[11] Scholes v. Chadwick, 2 Mo. & R. 507.

[12] Bridgman v. Jennings, 1 Ld. Raym. 734; B. N. P. 283; Davies v. Pierce, 2 T. R. 43; Allott v. Wilkinson, 4 Gwill. 1585; 2 E. & Y. 293. That such a survey is not evidence against a stranger; Anon., 1 Ld. Raym. 734. It has been said that an old map has been allowed in evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase. Gilb. Ev. 78.

[13] Gully v. Exeter, 5 Bing. 171.

[14] Sweetland v. Webber, 1 Ad. & El. 733.

Sec. 161. Rule as to Privies applicable in Cases of Personality.

This rule as to privity of estate is generally applied to cases of real property, but the principle is equally applicable in matters relating to personalty, where an identity of interest exists; and where a chattel or a personal contract has been assigned, the declarations of the assignor are generally admissible against the assignee. Thus the declarations of a vendor of personal property while in possession after the sale are admissible to explain the character of his possession,[1] but the vendor of personal property cannot after a sale of the same prejudice the vendee's rights by an *ex parte* denial of the *bona fides* of the transaction.[2] It has been held, upon an issue between two persons, whether a third person died possessed of certain personal property, that evidence might be given of a declaration, made by that third person, that he had assigned the property, the party against whom the declarations were adduced claiming under that person.[3]

[1] Murphy v. Mulgrew, 102 Cal. 547, 36 P. 857, 41 Am. St. Rep. 200.

[2] Glaucke v. Gerlick, 91 Minn. 282, 98 N. W. 94.

[3] Wilstead v. Levy, 1 M. & R. 138; Snelgrove v. Martin, 2 M'Cord, 241; Hatch v. Dennis, 10 Me. 244; Gibblehouse v. Strong, 3 Rawle (Penn.), 437; Harrison v. Vallance, 1 Bing. 45. Ivat v. Finch, 1 Taunt. 141, was an action of trespass for taking three mares, the property of the plaintiff. The defendant who was lord of the manor, justified under a heriot custom; and the sole question between the parties was, whether one Alice Watson, the tenant, was possessed of the mares at the time of her death. The plaintiff contended that she had given them to him some time before, and tendered in evidence her declarations to that effect. These were rejected at the trial, but the court above held that they were admissible, as they were against her interest, and the right of the lord depended upon her title. But where the fact of this dependence is not directly raised by the issue, such declarations will be inadmissible; and in Stotherd v. James, 1 C. & K. 121, where an issue was directed to try, whether goods seized in A.'s house at the suit of the defendant were the property of the plaintiff, the declarations of A. respecting the property were held to be inadmissible, inasmuch as on that narrow issue the defendant would succeed, whether the goods belonged to A. or to any other person besides the plaintiff. Had the issue raised the question, whether the goods belonged to A. at the time of the execution, it would seem, on principle, that his declarations made before the seizure would have been evidence against the defendant; although in Prosser v. Gwillim, 1 C. & K. 95, on an issue similar to that which was raised in Stotherd v. James, WIGHTMAN, J., rejected the debtor's admissions, on the ground that the execution creditor claimed *adversely* to him.

These admissions by third persons, as they derive their value and legal force, from the relation of the party making them to the property in question, may be *proved by any competent witness* who heard them, without calling the party by whom they were made. The question is, whether he made the admission, and not merely whether the fact is as he admitted it to be. Its truth, where the

But where the question was whether certain goods which had been seized under a *fi. fa.* against A. were his property, or the property of the plaintiff, who claimed under a sale; and in order to show that the sale was fraudulent, it was proposed to give in evidence a statement made by A. when the execution went in, and while he remained in possession, it was ruled that the evidence was not receivable.[4] As to admissions by persons in possession of chattels or negotiable securities being evidence against subsequent holders, which may be thought analogous to admissions by privies in estate, it appears to be a rule, that *where a person must recover through the title of another, he is bound by the declaration of the party through whom he claims.* Thus, if a person bring

admission is not conclusive (and it seldom is so), may be controverted by other testimony, even by calling the party himself, when competent: but it is not necessary to produce him, his declarations, when admissible at all, being received as original evidence, and not as hearsay. Woolway v. Rowe, 1 Ad. & El. 114; Brickell v. Hulse, 7 Ad. & El. 454. *The time and circumstances* of the admission are to be considered, and whenever the declarations of a third person are offered in evidence, on the ground that the party against whom they are tendered derives his title from such person, it must be shown that they were made at a time when the declarant had an interest in the property in question; because it is manifestly unjust, that a person, who has parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement which he may choose to make. Doe v. Webber, 1 Ad. & El. 740. Thus, the admission of a former party to a bill of exchange, made after he has negotiated it, cannot, under any circumstances, be received against the holder. Pocock v. Billing, 2 Bing. 269; Shaw v. Broom, 4 D. & R. 730; Roberts v. Justice, 1 C. & K. 93. And where a person had, by a voluntary post-nuptial settlement, conveyed away his interest in an estate, and afterwards had executed a mortgage of the same property, it was held that his admission that money had actually been advanced upon the mortgage could not be received on behalf of the mortgagee, who was seeking to set aside the former settlement as voluntary and void. Doe v. Webber, 1 Ad. & El. 733; Gully v. Exeter, 5 Bing. 171.

[4] Roberts v. Justice, 1 C. & K. 93.

So upon the trial of an issue, directed to ascertain whether certain goods which had been seized by the sheriff under a *fi. fa.* against a third party, at the suit of the defendant, were the goods of the plaintiff, who claimed them under an assignment, it was held by WIGHTMAN, J., that a statement, made by the third party before the execution went in, was not admissible on behalf of the plaintiff, as the execution creditor did not claim under the third party, but adversely to him. Prosser v. Gwillim, 1 C. & K. 95. And upon a similar issue, MAULE, J., rejected the declarations of the debtor as to the property in the goods, upon the ground that, if they did not belong to the plaintiff, the defendant would succeed on the issue, whether they belonged to the debtor or to any other person except the plaintiff. Stothert v. James, 1 C. & K. 121. An admission by a person who takes a bankrupt's goods in execution, that he knew an act of bankruptcy had been committed, is not evidence against the person who takes the goods by assignment from the sheriff, where the admission is subsequent to the assignment. Deady v. Harrison, 1 Stark. R. 60.

an action upon a bill of exchange, the declaration of a person who, at the time when such declaration was made, was holder of the bill, and who had not parted with it till after it was due, is evidence against the plaintiff, being made by one according to whose title his own must stand or fall.[5] So in an action by the indorsee against the acceptor, where the defense is that the bill was obtained by fraud, declarations of the drawer to that effect are admissible, if it can be shown that the plaintiff was privy to the fraud.[6]

But it seems that the analogy with respect to the admissions of privies in estate is not adhered to where the title to negotiable instruments is derived from persons who have made admissions, but where there is not any existing identity of interest. In such cases, the right of a person holding by a good title is not to be cut down by the acknowledgment of a former holder that he had no title. Thus, in an action by the indorsee against the maker of a promissory note payable with interest on demand, the declarations made by the payee, whilst the note was in his possession, to the effect that he gave no consideration for it to the maker, were held inadmissible for the defendant, on the ground that the plaintiff could not be identified with the payee, the bill not being overdue at the time of the indorsement.[7] The declarations were not those of a person holding the negotiable security under the same circumstances as the party to the action. It has been held[8] that as the indorser of a promissory note does not claim by the title of the indorser, but has a title of his own as indorsee, he ought not to be affected by any declarations of the indorser,—the note not being taken without consideration, or after it was due,—

[5] Benson v. Marshall, cited in Shaw v. Broom, 4 D. & R. 731. See, also, Beauchamp v. Parry, 1 B. & Ad. 89.

[6] Peckham v. Potter, 1 C. & P. 232.

[7] Barough v. White, 4 B. & C. 325; explained in Woolway v. Rowe, 1 Ad. & El. 116. See, also, Phillips v. Cole, 10 Ad. & El. 106; Smith v. De Wruitz, R. & M. 212.

[8] Beauchamp v. Parry, 1 B. & A. 89. An exception is there made as to declarations contemporaneous with the making of an instrument, and the case of Kent v. Lowen, 1 Camp. 177, was referred to, where letters from the payee to the maker were admitted, which stated an usurious consideration for the note. It was said that if the declarations had been made as in the case of Kent v. Lowen, at the time of the contract, the case might be different. It is to be observed that in Kent v. Lowen, the letters were the usurious contract itself, and it can make no difference whether an act consist of oral declarations or not. Some confusion is, however, introduced into the case by Lord ELLENBOROUGH stating that evidence of an act done was admissible against persons claiming under those who did the act—whereas the admissibility of the evidence does not appear to depend on the privity of the parties.

notwithstanding the declarations were made whilst the indorser was in possession of the note. But where it appears that the indorsee is merely the agent to sue for the indorser, the declarations of the latter, whilst he was holder, are evidence against the former.[9]

Admissions respecting the subject-matter of a cause, by a person who at the time of making them had the same interest in such matter as one of the parties to the cause, are admissible in evidence against that party, though the person who made the admissions is alive and might be called as a witness.[10] The same rule applies to admissions of agents, which are receivable in evidence against principals, when part of the *res gestae*. There might seem to be some reason for a distinction between the rule respecting agents, and that which relates to declarations against interest, inasmuch as in the latter case the party to the suit is to be affected by the declarations of a person with whom he had no community of interest, and for whose assertion he is not responsible.

Sec. 162. Principal and Surety.

It is a general rule, founded on principles of justice in regard to the relation of principal and surety, that the surety ought not to be affected by an admission made by his principal, although he may be affected by declarations or statements made by the principal *when they are connected with the business in respect of which the surety becomes bound, and are made by the principal at the time of transacting that business*;[1] and this is the rule, although the surety was not present.[2]

[9] Welstead v. Levy, 1 Mo. & R. 138; Harrison v. Vallance, 1 Bing. 45.

[10] Woolway v. Rowe, 1 Ad. & El. 114; Brickell v. Hulse, 7 Ad. & El. 454.

[1] Bailey v. McAlpin (Ga., 1905), 50 S. E. 388; Knott v. Peterson, (Iowa, 1904), 101 N. W. 173; Bondurant v. Bank, 7 Ala. 830; Com. v. Kendig, 2 Penn. St. 448; Dunn v. Slee, Holt, 401. An admission made by a public officer in the discharge of his duties is evidence as against the sureties on his official bond. Walling v. Morgan County, 126 Ala. 326, 28 So. 433, 437. Nor is a surety affected by a judgment recovered against his principal, adjudging him to have been guilty of fraud and misconduct as a general guardian, the surety not having been a party to the suit. Clark v. Montgomery, 23 Barb. 464; Douglass v. Howland, 24 Wend. (N. Y.) 35-58; Coan v. Osgood, 15 Barb. (N. Y.) 583; Snell v. Allen, 1 Swan (Tenn.), 208. In an Alabama case it was held that the principal's admission is not admissible against his surety unless it is a part of the *res gestae*. Walker v. Forbes, 25 Ala. 139; Blair v. Inslea, 10 Mo. 559.

[2] Chapel v. Washburn, 11 Ind. 393. Thus, where a person had become

Sec. 163. Offers of Compromise.

Offers of compromise, or offers in the nature of pacification of litigation, expressly or impliedly made without prejudice, upon

surety by a bond for the faithful conduct of a clerk, it was held, in an action upon the bond, that an admission by the clerk, made after he was discharged, of various sums which he had embezzled, was not receivable in evidence against the surety. Smith v. Whittingham, 6 C. & P. 78. In Cutler v. Newlin, Manning's Dig. N. P. 137, on the execution of a writ of inquiry on an indemnity bond, an admission by the principal of the amount of damnification was considered by HOLROYD, J., inadmissible. In Perchard v. Hamilton, 1 Esp. 394, which was an action by a sheriff upon a bond to indemnify him against defaults of his bailiff, a written admission by the bailiff of having received levy money was held by Lord KENYON, C. J., to be admissible against the defendant. It was so ruled by him on the ground that the bailiff was in fact the defendant in the action; but there seems to have been no evidence to show that the defendant was indemnified by the bailiff; and as the bailiff was alive, it would appear that he might have been called as a witness. But in debt against a surety for his principal's embezzlement the indictment drawn up by the plaintiff's attorney is admissible to show what was claimed to be embezzled. Fireman's Ins. Co. v. McMillan, 29 Ala. 148. So, in an action upon a guaranty to pay for goods sold and delivered to a third person, what such person has admitted respecting the delivery of the goods is not evidence to charge the person giving the guaranty. Evans v. Beattie, 5 Esp. 26.

Entries made by a deceased person in the course of duty, or by which he has charged himself with the receipt of money, being admissible as against all the world, (Gleadow v. Atkin, 1 C. & M. 423), are of course evidence against a person who has become his surety that he would keep his accounts faithfully. Goss v. Watlington, 3 B. & B. 132; Whitnash v. George, 8 B. & C. 556; Middleton v. Melton, 10 B. & C. 317; McGahey v. Alston, 2 M. & W. 206.

The admissions of a principal are admissible to affect his own liability, although his sureties are parties defendant in the suit. Haeklеman v. Moat, 4 Blackf. (Ind.) 164.

The statement of a constable, when presenting a note to the maker for payment, that the note was in his hands for collection, is admissible in evidence against the sureties of the constable, in an action to recover for a failure by the constable to pay over the money collected on the note. State v. Grupe, 36 Mo. 365.

In an action against a surety the admissions and declarations of the principal, who had deceased, made against his interest, at a time when he could have had no motive to misrepresent, and in relation to facts with which he must have been well acquainted, were held to be evidence against the surety. Hinckley v. Davis, 6 N. H. 210.

Where a bond for performance of the duties of collector of tolls was given to the canal commissioners of New York, bearing date June 1st, with a certificate of the sureties' sufficiency indorsed thereon, by a public officer, under date of June 25th, it was held that the admissions of the commissioners that they presumed the bond was not delivered to them, or accepted by them, until after the certificate of approval was thus indorsed, was not sufficient to repel the legal presumption that the bond was delivered and accepted on the day of its date, when the admission was accompanied with the declaration that they had no recollection as to the time when the bond was delivered. Seymour v. Van Slyck, 8 Wend. (N. Y.) 404. If the evidence as to the time of execution be balanced, the date will be held to be the true time. Allen v. Rhode-

the grounds of public policy, are not admissible in evidence against the party making them.[1] For a much stronger reason, evidence of a settlement with a third person injured in the same casualty ought to be excluded. The court therefore properly held that, in a suit for the recovery of damages to a carriage and horses, it was incompetent to show that the defendant had settled with the driver for any claim that he might have for personal injury received in the same collision.[2] This rule, as was stated by Lord MANSFIELD, is predicated upon the ground that "it must be permitted to all men to buy their peace, without prejudice to them, should the offer not succeed, such offers being made to stop litigation, without regard to the question whether anything is due or not." If, therefore, the defendant, on being sued for a certain sum, should offer the plaintiff a less sum, and at the same time state that such offer was made without prejudice, such offer is not admissible in evidence, for it is irrelevant to the issue; it neither

baugh, Wright (Ohio), 322. A cashier of a bank, in a suit against his surety, was charged with having converted to his own use, at specified times, and some time before certain declarations offered in evidence were made, several sums of money belonging to the plaintiff. These facts constituted the breach of the bond relied on in the suit against the surety, and were the facts in issue. It was held that evidence not tending to show what the cashier said or did, or the entries he made *at the time he received and converted the money*, was improperly received against the surety. Stetson v. City Bank of N. O., 2 Ohio St. 167. But in a suit upon a bond against the executor of the principal and his sureties, evidence is admissible of the declarations of the deceased principal that he was in default on the bond. Mahaska v. Ingalls, 16 Iowa, 81. So in a joint action against a cashier and his sureties on his bond, the admissions and declarations of the cashier, as to his defaults, are evidence against the sureties. Amherst Bank v. Root, 2 Met. (Mass.) 522. And in *scire facias* against an indorser of a writ, declarations of the defendant to an officer who is seeking to collect of him the execution issued on the judgment in the original suit, are competent. Davis v. Whitehead, 1 Allen (Mass.), 276. But the admissions of a principal as to his liability to a plaintiff, made after a breach of his contract, are not competent evidence against his surety. Cassity v. Robinson, 8 B. Mon. (Ky.) 279.

[1] Kroetch v. Empire Mill Co. (Idaho, 1903), 74 Pac. 868; Terry v. Taylor, 33 Mo. 323; Perkins v. Concord R. R. Co., 44 N. H. 223; State v. Dutton, 11 Wis. 373; Rideaut v. Newton, 17 N. H. 71; Williams v. Thorp, 8 Cow. (N. Y.) 201. But see Grubbs, v. Nye, 21 Miss. 443; Cory v. Bretton, 4 C. & P. 462; Johnson v. Sheridan, 2 C. & K. 24; Healey v. Thacher, 8 C. & P. 388; Paddock v. Forrester, 3 Scott, 724. The statement in a letter "I beg to say that it is my wish to settle it with you on as reasonable terms as you will accept" where the writer contends that he does not know anything about the claim made is not an acknowledgment of liability but an offer of compromise and inadmissible. Kelly v. Strouse, (Ga.), 43 S. E. 280.

[2] Georgia Ry. & Electric Co. v. Wallace & Co., (Ga., 1905), 50 S. E. 478.

admits nor ascertains any debt, and is no more than saying he would give a certain sum to be rid of the action.[3] So, in equity, it has been held that the giving of a small sum in order to obtain the release of a right could not be considered as an acknowledgment that a right existed; it amounts only to this—"I give you so much for not seeking to disturb me."[4] But it has been held that the fact that a defendant compromises a suit against him is evidence, but not conclusive evidence, of the truth of the matters alleged in the complaint.[5] Perhaps, also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession,[6] will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appear to have been made under the faith of a pending treaty, into which the party has been led by the confidence of an arrangement being effected,[7] although in this case, if the admission is merely of a collateral or indifferent fact, such as the handwriting of a party, which is capable of easy proof by other means, and is not connected with the substantial merits of the cause, it will be received,[8] although statements made during the negotiations for compromise are not admissible.[9]

But evidence of the admission of any independent fact is receivable although made during a treaty of compromise.[10] Letters from the plaintiff to the defendant in an action for personal injuries containing statements of her claim and the amount demanded, are admissible as bearing on the extent and genuineness of her injuries.[11] An offer of settlement made by an employer to his employe is inadmissible as fixing liability, although the conversation may be relevant to prove a discharge.[12] Where a suit has been brought against a railroad its local counsel may testify that he received from the general counsel of the railroad three vouchers with which to make settlement of the alleged claim

[3] B. N. P. 236, *b*.
[4] Underwood v. Courtown, 2 Sch. & Lef. 67, 68.
[5] Pym v. Pym, 118 Wis. 662, 96 N. W. 429.
[6] Thomson v. Austen, 2 D. & Ry. 361.
[7] Waldridge v. Kennison, 1 Esp. 144.
[8] Id.
[9] Robertson v. Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543.
[10] Rudd v. Dewey, 121 Iowa, 454, 96 N. W. 973, 975; Mount v. Bogert, Anthon (N. Y.), 190; Murray v. Coster, 4 Cow. 635; Fuller v. Hampton, 5 (N. Y.) Conn. 416, 426; Sanborn v. Neilson, 4 N. H. 501; Delogny v. Rentoul, 1 Martin (La.), 175.
[11] Snow v. New York, N. H. & H. R. Co., 185 Mass. 321, 70 N. E. R. 205.
[12] Higgins v. Shephard, 182 Mass. 364, 65 N. E. R. 805.

and that he offered a sum in settlement of the suit which aggregated the three vouchers. It is not apparent that this payment was made as a concession or sacrifice in an effort to buy peace.[13]

There is a distinction between an offer or proposition to compromise a doubtful or disputed claim and an offer to settle upon certain terms a claim that is unquestioned. An admission made in an offer of the latter character will be admissible when one made in an offer of the former character will not.[14]

[13] Chesapeake & O. R. R. Co. v. F. W. Stock & Sons (Va., 1905), 51 S. E. 161.

[14] So where the plaintiff had demanded a settlement of the defendant and the defendant offered to settle in land and securities which offer appeared to accede to the plaintiff's demand on certain terms the offer was held admissible as not made with a view to compromise. Teasley v. Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113.

In England it is held that, in the absence of any express or strongly implied restriction as to confidence, an offer of compromise is admissible as *some* evidence of liability, Wallace v. Small, M. & M. 464; Watts v. Lawson, id. 447, n.; Nicholson v. Smith, 3 Stark. 129, and although the offer of a less sum than the amount demanded will not, in general, support a count on an account stated, inasmuch as it may be a mere offer to purchase peace, Wayman v. Hilliard, 7 Bing. 101; nor, perhaps, will an offer by the drawer of a bill, who is threatened with legal proceedings upon it, to give another bill by way of settlement, obviate the necessity of proving at the trial that he has received due notice of dishonor, Cuming v. French, 2 Camp. 106, note; yet there are occasions, as where drawer of a bill, whose signature is in issue, has proposed a settlement, when the fact of an offer having been made may be entitled to considerable weight. Harding v. Jones, Tyr. & Gr. 135. In one case, Thomas v. Morgan, 2 C., M. & R. 496, where the defendant was sued for keeping mischievous dogs, which had killed three of the plaintiff's cattle, and it appeared that on being told of the injury done by them he had offered to settle for it, the court held that although this was a fact which in strictness should have been submitted to the jury as evidence of the scienter, it was entitled to little, if any, weight, "as it might have been made from motives of charity without any admission of liability at all." They therefore refused a new trial, although the question, whether the offer of compromise was not an admission of the defendant's liability had not in point of fact been left to the jury, the attention of the judge not having been drawn to that particular point. Admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual. Gregory v. Howard, 3 Esp. 113; Slack v. Buchannan, Peake, 5.

In a Maine case, Rawell v. Montville, 4 Me. 270, where a town had voted upon two separate occasions to pay a person who made a claim against it for a personal injury received from an insufficient road, which sum was not accepted, it was held that these votes were not receivable as an admission of its liability by the town, being mere offers of compromise. But in a Massachusetts case, Harrington v. Lincoln, 4 Gray (Mass.), 563, where the selectmen of a town, in the course of a conversation had with a person claiming damages for an injury occasioned by a defect in a highway, with a view to a compromise, offered to pay for his loss of time and actual expenses, and asked him what they would amount to, it was held that his statements in reply, of the

Sec. 164. How Admissions should be Weighed.

An important element in determining the force to be given to admissions is *the circumstances under which they were made.* If they were under constraint or illegal duress, they are not admissible;[1] and the same is also true if they were made by a person under a misapprehension of his legal rights,[2] especially where such misapprehension was induced by the other party. But admissions made under *legal constraint* are competent evidence in some cases, as, affidavits sworn to in a former suit,[3] and this is the rule, although the facts sworn to were irrelevant,[4] or although the party was not bound to disclose them,[5] and although he had no opportunity of fully explaining what he meant.[6] In the case last cited, in an action for taking the plaintiff's ship, the testimony of the defendant, given as a witness in an action between other parties, in which he admitted the taking of the ship, was allowed to be proved against him; although it appeared that, in giving his evidence, when he was proceeding to state his reasons for taking the ship, the judge stopped him by saying that it was unnecessary for him to vindicate his conduct. The manner in which the evidence was obtained was matter of observation to the jury; but as what was said bore directly on the issue, it could not be excluded as evidence of the fact. So, where a defendant had been examined before commissioners of bankrupts, although the whole of what was said had not been taken down, yet the portion that was reduced to writing having been read over to him, and he having signed it, it was held to be receivable against him, as a statement of facts, the truth of which he had admitted.[7] It seems that an admission obtained under a compulsory examination

amount of those items, *if not made as offers upon which he was willing to settle*, were admissible in evidence against him.

In Mississippi it is held that offers of compromise relating to notes may be given in evidence as an admission of the execution of the notes. Grubbs v. Nye, 21 Miss. 443. See, also, Lobach v. Hotchkiss, 17 Abb. (N. Y.) Pr. 88, where, in an action against a shipowner to recover the amount of advances made to compromise a demand for salvage, evidence that the defendant claimed and received from the underwriters his share of the insurance on the basis of an adjustment of general average, which included the advances made by the plaintiff, was held to amount to an admission of the defendant's liability for such advances.

[1] Stockfeth v. De Tastet, 4 Camp. 11; Robson v. Alexander, 1 M. & P. 448.

[2] Moore v. Hitchcock, 4 Wend. (N. Y.) 292.

[3] Ashmore v. Hardy, 7 C. & P. 501.

[4] Stockfeth v. De Tastet, *ante.*

[5] Smith v. Bendall, 1 Camp. 30.

[6] Callet v. Keith, 4 Esp. 212.

[7] Milward v. Forbes, 4 Esp. 171.

will not be evidence of an *account stated;* but this probably rests on the ground that it is made to a third party, while, to support an account stated, the admission must be made either to the person to whom the money is owing, or to some one sent by him.[8]

There is no difference, so far as the admissibility of this kind of evidence is concerned, between direct admissions, and those which are *incidental,* or made in some other connection, or involved in the admission of some other fact. Thus, in an action by the assignees of a bankrupt against an auctioneer to recover the proceeds of a sale of the bankrupt's goods, the defendant's advertisement of the sale, in which he described the goods as "the property of D., a bankrupt," was held to be a conclusive admission that D. was a bankrupt, and that the defendant was acting under his assignees.[9] So where a party, with a view to suing out a commission of bankruptcy against a trader, made an affidavit that the trader owed him a certain specific sum, and was become bankrupt, it was held that he could not afterwards dispute the bankruptcy when he was himself sued in trover by the assignees of the bankrupt, appointed under a second commission, for the price of flour which he had clandestinely received from the trader, and applied to the discharge of his own debt.[10]

Sec. 165. Admissions implied from Conduct.

The conduct of a party may be such of itself, unaccompanied by any words or declaration, as to amount to an admission of certain facts. So admissions may be *implied from assumed character;* for, whenever the existence of any domestic, social, or official relation is in issue, any recognition of that relation, whether by word or deed, is *prima facie* evidence, against the person making such recognition, that the relation exists.[1] This general rule, although most frequently applied against a person who has recognized the character or office of another, also embraces, in its principle, any representations or language in regard to himself. Thus, where a person has *assumed to act in an official character,* this is an admission of his appointment or title to the office, so

[8] Tucker v. Barrow, 3 C. & P. 90.
[9] Maltby v. Christie, 1 Esp. 342; Rankin v. Horner, 16 East, 193; Taylor on Ev. 533.
[10] Ledbetter v. Salt, 4 Bing. 623; Harmar v. Davis, 7 Taunt. 577.
[1] Dickinson v. Coward, 1 B. & A. 677, 679; Inglis v. Spence, 1 C. M. & R. 436.

far as to render him liable, even criminally, for misconduct or neglect in such office.[2]

The same rule prevails where a person has *recognized the official character of another,* by dealing with him in such character or otherwise; at least such conduct is *prima facie* evidence of his title against the party thus recognizing it.[3] Admissions implied from the *conduct* of a party are governed by the same principles. Thus, the suppression of documents is an admission that their

[2] Bevan v. Williams, 3 T. R. 635 *a;* R. v. Gardner, 2 Camp. 513; R. v. Kerne, 7 How. St. Tr. 714; R. v. Brommick, id. 722; R. v. Atkins, id. 738; R. v. Borrett, 6 C. & P. 124; Cross v. Kaye, 6 T. R. 663; Trowbridge v. Baker, 1 Cow. (N. Y.) 251; Lister v. Priestly-Wightw. 67.

[3] Peacock v. Harris, 10 East, 104. Thus, where a person had received credit from the renter of turnpike tolls, and had afterwards accounted with him in that character, and made him a partial payment, he was not permitted to question the legality of his appointment; and where a farmer-general of post-horse duties brought an action for certain statute penalties against a person who let out horses for hire, proof of his appointment was waived, the defendant having previously accounted with him as farmer-general. Radford v. M'Intosh, 3 T. R. 632. So, the clerk of the trustees of a turnpike road was not allowed to show that a person who had acted as one of the trustees, and had been treated as such by himself, while clerk, was not duly qualified, Prichard v. Walker, 3 C. & P. 212; and in an action by the assignees of a bankrupt against a debtor, who has made them a partial payment, (Dickinson v. Coward, 1 B. & A. 677), or has acknowledged their title in letters to the solicitor of the commission, (Inglis v. Spence, 1 C. M. & R. 432; Crofton v. Poole, 1 B. & Ad. 568), the plaintiffs need not prove their title as assignees, though notice to dispute has been given. So, where an attorney brought an action against a defendant for defamation, in charging him with swindling, and threatening to have him struck off the rolls, this threat was held to impart an admission that the plaintiff was an attorney, Berryman v. Wise, 4 T. R. 366; and in a similar action brought by a physician, where the plaintiff was spoken of as "Doctor L.," and the defendant, who was an apothecary, had made up medicines prescribed by him, the court was equally divided upon the question, whether the defendant's words and conduct amounted to an acknowledgment of the plaintiff's character. In actions of this kind, however, *if the words complained of charge a want of qualification* and not mere misconduct, the plaintiff must prove that he possesses the character which has been impugned, for the slander in such case does not admit it. Smith v. Taylor, 1 Scott, 196; Collins v. Carnegie, 1 Ad. & El. 703. This rule, or rather exception to the rule, is well illustrated by an English case. Lipscombe v. Holmes, 2 Camp. 441; R. v. Barnes, 1 Stark. 243; Cummin v. Smith, 2 S. & R. (Penn.) 440; Divoll v. Leadbetter, 4 Pick. (Mass.) 220. In that case, an action was brought for work and labor as a surgeon; and the defense was that the plaintiff was a physician, and therefore incapable of maintaining an action for fees. It was shown that he had written prescriptions and signed himself M. D., upon which Lord ELLENBOROUGH was on the point of nonsuiting him, saying that "if a person passes himself off as a physician, he must take the character *cum onere.* It appearing, however, that the defendant had paid money into court, his Lordship thought that this act removed the objection, being tantamount to an admission of the plaintiff's right to sue as a surgeon.

contents were deemed unfavorable to the party suppressing them,[4] and where the deceased admits that he shot himself and refuses to explain how or why he did it this is convincing proof that there was no explanation to make and that the act was suicidal.[5] The entry of a charge to a particular person in an account book, or the making out of a bill in his name, is an admission that the goods were furnished on his credit.[6] The omission of a claim by an insolvent in a schedule of the debts due to him, given in on oath, is an admission that it is not due; though whether it amounts to a conclusive admission may be a question of some doubt.[7] Payment of money is an admission that the person to whom it was paid is the proper person to receive it, but not against the receiver that the payer was the person who was bound to pay it; for the party receiving payment of a just demand may well assume without inquiry that the person tendering the money was the person legally bound to pay it.[8] Relief given at various times to a pauper while residing in another parish is cogent, though not conclusive, evidence that he is settled in the relieving parish;[9] and even a single instance of such relief having been given will warrant a similar conclusion.[10] A distinct promise by the drawer to pay, or indeed any acknowledgment by him of liability upon, a dishonored bill,

[4] James v. Bion, and Owen v. Flack, 2 S. & S. 606, 607; Bell v. Frankis, 4 M. & G. 446; Curlewis v. Corfield, 1 Q. B. 814.

[5] Sutcliffe v. Iowa Traveling Mens' Association, 119 Iowa, 220, 93 N. W. 90.

[6] Storr v. Scott, 6 C. & P. 241; Thompson v. Davenport, 9 B. & C. 78.

[7] In Nicholls v. Downes, 1 M. & R. 13, Lord TENTERDEN held it to be conclusive, apparently questioning Hart v. Newman, 3 Camp. 13, where Lord ELLENBOROUGH treated it as entitled to little weight. See Tilghman v. Fisher, 9 Watts (Penn.), 441.

[8] James v. Bion, 2 S. & S. 606; Chapman v. Beard, 3 Anstr. 942.

[9] R. v. Barnsley, 1 M. & Sel. 377; R. v. Wakefield, 5 East, 335; R. v. Stanley, 15 East, 350; R. v. East, Winch., 12 A. & E. 697; R. v. Yarwell, 9 B. & C. 894; R. v. Carnarvonshire Js., 2 Q. B. 325.

[10] R. v. Edwinstowe, 8 B. & C. 671. Of course the effect of such evidence will be much stronger if the examination states a distinct head of settlement in the relieving parish, though the technical proof may fail to establish it satisfactorily. R. v. Bedingham, 1 Sess. Cas. 114. On the other hand, it has been held that the relief of a pauper, while residing in the relieving parish, is no evidence whatever of a settlement, however frequently it may have been bestowed. R. v. Chatham, 8 East, 498; R. v. Trowbridge, 7 B. & C. 252; R. v. Coleorton, 1 B. & A. 25; but this rule rests not so much on the absence of any presumption deducible from the conduct of the relieving parish, as on the impolicy of permitting such evidence to have any weight; for if parish officers, by giving relief to a pauper, were to make evidence against themselves as to his settlement in their parish, they would perform their duty to casual poor with great reluctance. R. v. Chatham, 8 East, 501; R. v. Coleorton, 1 B. & Ad. 27.

will raise an inference that he has received due notice of dishonor, and, in the case of a foreign bill, that it has been duly protested;[11] and a jury will be justified in coming to the same conclusion on less positive evidence; as, for instance, if the drawer, in disclaiming liability, when threatened with an action, did not rest his defense on the want of notice, but on some different ground.[12] The maxim, *expressum facit cessare tacitum,* will here raise a presumption which a defendant may find it difficult to rebut. Suing[13] or distraining[14] for rent, accruing due after a forfeiture of which the lessor has notice, as also the mere acceptance of such rent, amounts to an acknowledgment of the tenancy on the part of the lessor, and is consequently a waiver of the forfeiture;[15] although the breach is a continuing one, as the using of rooms in a prohibited manner, or the omitting to keep premises insured, the acceptance of rent after such breach does not amount to a waiver of the forfeiture incurred by subsequent user or omission.[16]

Sec. 166. Admissions from Acquiescence.

Admissions may be implied from the *acquiescence* of the party. *But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party,*[1] *and it must appear that the fact claimed to be admitted was then material to the interests of the party who kept silent.*[2] And whether it is acquiescence in the conduct or in the language of others, *it must plainly appear that such conduct was fully known, or such language fully understood, by the party,* before any inference can be drawn from his passiveness or silence. So *the circumstances must have been such as not only afforded*

[11] Hicks v. Duke of Beaufort, 4 Bing. N. C. 229, 232; Campbell v. Webster, 2 C. B. 258; Patterson v. Becher, 6 B. Moore, 319; Brownell v. Bonney, 1 Q. B. 39. See Bell v. Frankis, 4 M. & G. 446.

[12] Wilkins v. Jadis, 1 M. & Rob. 41; Curlewis v. Corfield, 1 Q. B. 814.

[13] Roe v. Minshall, cited B. N. P. 96 *c.*

[14] Doe v. Peck, 1 B. & Ad. 428.

[15] Doe v. Davids, 2 Cowp. 804; Roe v. Harrison, 2 T. R. 430; Doe v. Allen, 3 Taunt. 78; Doe v. Rees, 4 Bing. N. C. 384.

[16] Doe v. Woodbridge, 9 B. & C. 376; Doe v. Peck, 1 B. & Ad. 428; Hyde v. Watts, 12 M. & W. 254; Doe v. Gladwin, 6 Q. B. 963.

[1] Allen v. McKeen, 1 Sum. (U. S.) 314; People v. McCrea, 32 Cal. 98; Black v. Hicks, 27 Ga. 522; Corser v. Paul, 41 N. H. 24; Hagenbaugh v. Crabtree, 33 Ill. 225.

[2] Thayer v. Usher, 98 Me. 468, 57 A. 839.

him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated.[3] Thus, where a landlord quietly suffers a tenant to expend money in making alterations and improvements on the premises, it is evidence of his consent to the alterations;[4] but merely lying by and passively witnessing a breach of covenant for several years is not such an acquiescence as amounts to a waiver of the forfeiture.[5] If a tenant *personally* receives notice to quit at a particular day, without objection, it is generally an admission that his tenancy expires on that day;[6] but if he cannot read, or even did not read the notice in the presence of the person serving it upon him, it will be treated as a notice not personally served,[7] and will go for nothing.[8] It has been held that a trader, being inquired for and hearing himself denied, may thereby commit an act of bankruptcy;[9] and generally, where one knowingly avails himself of another's acts done for his benefit, the jury will be justified in considering such conduct as an admission of his obligation to pay a reasonable compensation.[10]

Raising an objection to one item of an account, no remark being made as to the rest, is evidence of an account stated as to those items, to which no objection has been made;[11] and, *among merchants,* an account rendered will be regarded as allowed, if it is not objected to within a reasonable time,[12] or at least if it is kept for any length of time without making an objection.[13] With re-

[3] Brainard v. Buck, 25 Vt. 573; Hersey v. Burton, 23 Vt. 685; Lawson v. State, 20 Ala. 65; Wilkins v. Stidger, 22 Cal. 231; Ralfe v. Ralfe, 10 Ga. 143; Melen v. Andrews, M. & M. 336; Boyd v. Bolton, 8 Ir. Eq. 113.

[4] Doe v. Allen, 3 Taunt. 78, 80; Doe v. Pye, 1 Esp. 366; Neale v. Parkin, 1 Esp. 229; Stanley v. White, 14 East, 332.

[5] Doe v. Allen, 3 Taunt. 78.

[6] Doe v. Biggs, 2 Taunt. 109; Thomas v. Thomas, 2 Camp. 647; Doe v. Forster, 13 East, 405; Oakapple v. Copous, 4 T. R. 361; Doe v. Wombwell, 2 Camp. 559.

[7] Doe v. Calvert, 2 Camp. 388.

[8] Thomas v. Thomas, 2 Camp. 649; Doe v. Forster, 13 East, 405.

[9] Key v. Shaw, 8 Bing. 320.

[10] Morris v. Burdett, 1 Camp. 218, where a candidate, not bound by statute to pay for the hustings erected for an election, had made use of them; Abbot v. Hermon, 7 Me. 118, where a school-house was used by the school district; Hayden v. Madison, 7 id. 76.

[11] Chisman v. Count, 2 M. & G. 307.

[12] Sherman v. Sherman, 2 Vern. 276.

[13] Freeland v. Heron, 7 Cranch (U. S.), 147, 151; Murray v. Toland, 3 Johns. Cas. (N. Y.) 575; Coe v. Hutton, 1 S. & R. (Penn.) 398; M'Bride v. Watts, 1 M'Cord (S. C.), 384; Corps v. Robinson, 2 Wash. (U. S.) C. C. 388; Willis v. Jernegan, 2 Atk. 252, *per* Lord HARDWICKE; Tickel v. Short, 2 Ves. Sen. 239, *per* id., where the account had been kept without objection for two years.

spect to ordinary accounts, however, a distinction has been made between such as are *sent by post,* and those *delivered by hand;* and it has been held that the former, though kept by the party to whom they were sent without observation, are not admissible against him, as evidence that he had acquiesced in their contents.[14] In the case last cited, BUSH, C. J., said that what a party *says* upon an account furnished to him, or upon a statement made in his presence, may be given in evidence against him along with the account or statement, because what is thus offered is the act or declaration of the party to be affected by it, and the account or the statement is by reference made a part of such act or declaration; but the naked fact that an account remains in the possession of a party to whom it was sent, cannot amount to an acquiescence in its contents. The admission of such evidence would countenance the notion that a man might, by furnishing an account claiming a balance against his *creditor,* establish an acquittance for himself.

The authorities make a distinction between statements made orally and those contained in letters which are unanswered or not acted upon. In the former case the party to whom statements hostile to his interest are made may with much reason be required to contradict or be held to acquiesce in their truth. In the latter case he is not called upon to go to the trouble and expense of writing a denial and silence cannot be construed into acquiescence in the truth of the written statements.[15]

Letters, however, or other papers found in a party's possession, will occasionally in a civil suit be evidence against him, as raising an inference that he knows their contents and has acted upon them;[16] and in criminal prosecutions, especially those for conspiracy and treason, letters and papers so found are frequently received, though their weight, as evidence against the prisoner, will in great measure depend on the fact, whether answers to them can be traced, or whether anything can be shown to have been done upon them.[17]

[14] Price v. Ramsay, 2 Jebb & S. 338.

[15] State Bank of St. Johns v. McCabe, 135 Mich. 479, 98 N. W. 20; Fairlie v. Denton, 3 C. & P. 103; Doe v. Frankis, 11 A. & E. 795. The failure of an attorney for a creditor to answer a letter from the debtor disputing the claim cannot be construed as an admission. Irwin v. Buffalo Pitts Co. (Wash., 1905), 81 Pac. 849.

[16] Hewitt v. Piggott, 5 C. & P. 75.

[17] R. v. Horne Tooke, 25 How. St. Tr. 120, 121; R. v. Watson, 2 Stark. 140.

So, also, the opportunity of constant access to documents may sometimes, by raising a presumption that their contents are known, afford ground for affecting parties with an implied admission of the truth or correctness of such contents. Thus, one partner may be bound by the partnership books charging him with withdrawals where he might have examined them but did not.[18] So, the rules of a club, or a record of the proceedings of a society, contained in a book kept by the proper officer and accessible to the members;[19] charges against a club, entered by the servants of the house in a book kept for that purpose open in the club-room,[20] and the like, are admissible against the members; their knowledge of the contents of the books and their acquiescence therein being presumable under the circumstances.

As to admissions inferred from *acquiescence in the verbal statements of others,* the maxim, *qui tacet, consentire videtur,* is to be applied with careful discrimination. "Nothing," said DUNCAN, J., "can be more dangerous that this kind of evidence. It should always be received with caution, and never ought to be received at all, unless the evidence is of direct declarations of that kind, which naturally calls for contradiction; some assertion made to the party with respect to his right, which by his silence he acquiesces in."[21] A *distinction is made between declarations* made by a *party interested,* and those made *by a stranger;* and while what one party declares to the other without contradiction is admissible, what is said to a party by a third person may not be so. It may be impertinent, and best rebuked by silence.[22] And the same is true as to statements made by strangers in the presence of a party, and they will not be admissible against him if they are *not directly addressed* to him; because, in such case, he cannot generally be called upon to interfere. Therefore, where, in a real action, upon a view of the premises by a jury, one of the chain-bearers was the owner of a neighboring lot, respecting the bounds of which the litigating parties had much altercation, their declarations in his presence were held inadmissible against him, in a subsequent action respecting his own lot.[23]

[18] Safe Deposit Co. v. Turner, 98 Md. 22, 55 A. 1023, 1027.

[19] Raggett v. Musgrave, 2 C. & P. 556; Alderson v. Clay, 1 Stark. 405.

[20] Wiltzie v. Adamson, 1 Ph. Ev. 357.

[21] Moore v. Smith, 14 S. & R. (Penn.) 393.

[22] Child v. Grace, 2 C. & P. 193.

[23] Moore v. Smith, 14 S. & R. (Penn.) 388.

To affect a person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence, or even to himself, by parties interested, *but they must also have been made on an occasion when a reply from him might be properly expected.*[24]

Acquiescence cannot be inferred from failure of one to contradict a statement made on the stand in a suit to which he was not a party,[25] or to contradict declarations made by a judge in the presence of a party,[26] or to interrupt a judicial proceeding by denying a statement made by a witness,[27] as the conduct of cases in court, including the decision of what witnesses are to be called to the stand is with counsel.[28] But failure of a party to take the stand to deny evidence given may be an admission of its truth.[29] Therefore depositions taken in the presence of a party during a judicial investigation, observations made by a magistrate to the parties before him, and confessions of an accomplice criminating his co-prisoner before the justices, will not in any subsequent trial, whether civil or criminal, be evidence against the party who heard them in silence; because in judicial inquiries a regularity of proceeding is adopted, which prevents a person from interfering when and how he pleases, as he naturally would do in a common conversation.[30] The same inferences cannot, therefore, be drawn from his silence or his conduct on such occasions, as might reasonably result from similar behavior, were he under no restraint; and as it is only for the sake of these inferences that the statements of other persons can ever be admitted, they are properly rejected whenever they do not warrant the inferences sought to be drawn from them. If, however, the statement of one person calls for a reply from another, it may then be read in connection with the reply, and is evidence against the party replying, so far as the answer directly or indirectly admits its truth; and it makes no difference in the application of this rule whether the words were spoken by an interested party or a stranger; whether they

[24] Boyd v. Bolton, 8 Ir. Eq. R. 113.

[25] Caseday v. Lindstrom, 44 Or. 309, 75 Pac. 222.

[26] Keith v. Marcus, 181 Mass. 377, 63 N. E. R. 924.

[27] Horan v. Byrnes, 72 N. H. 93, 600, 54 A. 945, 949.

[28] Commonwealth v. Burton, 183 Mass. 461, 67 N. E. R. 419, 423.

[29] Thayer v. Usher, 98 Maine, 468, 57 A. 839; Blanchard v. Hodgkins, 62 Maine, 119.

[30] Melen v. Andrews, M. & M. 336; Short v. Story, Roscoe Ev. 38; R. v. Appleby, 3 Stark. 33; R. v. Turner, 1 Moo. C. C. 347, 348; Child v. Grace, 2 C. & P. 195.

were addressed or not to the party replying; or whether they fell from the parties, the witnesses or the court, in a judicial proceeding, or were uttered during the course of an ordinary conversation.[31]

But the *silence* of the party is, at best, worth very little as evidence of acquiescence, even where the declarations are addressed to himself, even at a time when he is at full liberty to reply as he thinks fit; and if he has no means of knowing the truth or falsehood of the statement, the fact that he did not in terms deny it is almost valueless.[32] In all these cases, it must always be distinctly remembered that it is not the statement made in the party's presence which is evidence against him, *but it is his own conduct in consequence of such statement* which is the sole evidence.[33]

[31] Child v. Grace, 2 C. & P. 193; Jones v. Morrell, 1 C. & K. 266; R. v. Edmunds, 6 C. & P. 164; Boyd v. Bolton, 8 Ir. Eq. 113.

[32] State v. Rawls, 2 N. & M'C. (S. C.) 301; Batturs v. Sellers, 5 H. & J. (Md.) 117; Hayslep v. Gymer, 1 Ad. & El. 165.

[33] A statement made by another person, or a conversation carried on in the presence and hearing of a party, to which he made no reply, cannot be received in evidence against him as an implied admission on his part of its truth, *unless it was of such a character as would naturally call for a response from him, and he was in a situation in which he would probably have replied to it.* Lawson v. State, 20 Ala. 65; Spencer v. State, 20 id. 24; Wilkins v. Stidger, 22 Cal. 231; Rolfe v. Rolfe, 10 Ga. 143; Abercrombie v. Allen, 29 Ala. 281; Brainard v. Buck, 25 Vt. 573; Hersey v. Burton, 23 Vt. 685.

But the declarations of one party, made in the presence of the other which do naturally call for a reply, and which are not denied by the other, are admissible as evidence for the former. Block v. Hicks, 27 Ga. 522; Hagenbaugh v. Crabtree, 3 Ill. 225; Bailey v. Woods, 17 N. H. 365; Corser v. Paul, 41 N. H. 24; McClenkin v. McMillan, 6 Penn. St. 366; Wells v. Drayton, 1 Mill (S. C.) Const. 111; Hendrickson v. Miller, 1 id. 296; Drumright v. State, 29 Ga. 430; People v. McCrea, 32 Cal. 98.

Thus, in a suit against an administrator for taking care of his intestate while a minor, the defense was that the latter lived with the plaintiff's father, A., and that the services sued for were rendered by him. The presence of the minor at A.'s house having been proved, it was held that evidence was admissible of A.'s declarations, made when the minor was introduced into the family, to show in what relation he stood to it. Maxwell v. Ratliff, 26 Ind. 157.

A party is not called upon to dispute an account on every occasion on which it may be presented; and when evidence of any act or declaration of a party is given, as tending to prove the account, *care should be exercised in determining whether the circumstances required the defendant to dispute the account,* so as to cause his omission to do so to have weight against him. Churchill v. Fulliam, 8 Iowa, 45; United States v. Kuhn, 4 Cranch (U. S. C. C.), 401; Bright v. Coffman, 15 Ind. 371; Gibnay v. Marchay, 34 N. Y. 301.

Declarations relating to the subject-matter of a suit, made by a third person, in the presence of a party to the suit, and to which such party had an opportunity to reply, but did

Sec. 167. Conclusive Admissions.

Conclusive admissions, or those which the party making them cannot deny, are, first, those which are expressly or tacitly made by the pleadings, and secondly, those which have been acted upon by others. In reference to admissions by the pleadings it may be said that a party may, by bringing an action on a contract, estop himself from denying its validity and obligation, in a subsequent action founded thereon, against himself.[1] At all events a party may, by an admission made in one suit, or by omitting to plead, conclusively bind himself thereby if a subsequent action is

not, are admissible in evidence against him. And such evidence cannot be controlled by proof of different declarations subsequently made by the same person (who died before the trial) to others. Boston, etc., R. R. v. Dana, 1 Gray (Mass.), 83; Turner v. Yeates, 16 How. (U. S.) 14. But it must be shown that the other party heard the declarations, or was in a situation where he ought to have heard them, or they are not admissible against him. Thus declarations made by one claiming a right of way, concerning it, in the presence of the owner of the estate, but not heard by him by reason of deafness, are inadmissible in evidence against him. Tufts v. Chartown, 4 Gray (Mass.), 537.

The silence of a tenant for life, when remarks are made in his presence in disparagement of his title, is held to be no evidence against his remainderman. McGregor v. Wait, 10 Gray (Mass.), 72.

In an action upon a contract which the plaintiff made through an interpreter, statements concerning the contract by the interpreter in the name of the plaintiff are admissible against the latter, without proof that they were truly the plaintiff's statements. Camerlin v. Palmer Co., 10 Allen (Mass.), 539.

Statements made in the presence of and hearing of a party, without contradiction by him, will not be construed as an admission by him of their truth, unless the truth of the statements must necessarily have been within his knowledge. Edwards v. Williams, 3 Miss (2 How.) 846.

Where a party omits to assert his claim to one or more large sums of money when all his demands are submitted to an arbitrator, such conduct is construed as an admission, to be properly used against him when subsequently setting up a claim to the same money. Such conduct, however, is open to explanation by the party, as resulting from accident or mistake. Moore v. Dunn, 42 N. H. 471.

An admission will never be presumed from mere silence, under the bare assertion of a claim, even though the claim is made by the party in whose favor it is asserted. But if a party in answer to such a claim makes any declarations as to his own rights, the whole conversation must be submitted to the jury. Mattocks v. Lyman, 16 Vt. 113. If, however, the statement calls for a reply, and it is of such a character that if it was not true the party would naturally deny it, his silence is admissible as tending to show that the statements were true. Thus the omission of a party to reply to statements in a letter about which he has knowledge, anw which, if not true, he would naturally deny, especially when he replies to other parts of the letter, is evidence tending to show that the statements so made and not denied are true. Fenno v. Weston, 31 Vt. 335.

[1] Fishmongers' Co. v. Robertson, 5 M. & G. 192.

brought against him for the same cause.[2] But the party may show that the alleged admission was not in fact signed or authorized by him. This rule applies to bankruptcy as well as to chancery proceedings.[3]

Statements made by a party in a pleading which is superseded or withdrawn are admissions and may go to the jury as affecting the weight and value of his later testimony,[4] although their withdrawal does nullify their conclusiveness.[5] Where an admission is made on account of the absence of a witness to prevent a continuance, that admission is not evidence in a subsequent trial when the witness is present.[6]

A pleading in another cause to which only one party to the case on trial was a party may be introduced against the pleader to show admissions made by him.[7] A statement by counsel in opening admitting certain things is binding upon the client and obviates the necessity of proof of those matters by the other side,[8] when made even in a former trial of the same case.[9]

A plea of guilty in a criminal proceeding is evidence against the party as an admission in a civil proceeding involving the same facts. Such plea is an admission of a solemn character, although it is not an estoppel and may be rebutted or explained. It may not be evidence of surplusage alleged in the indictment, but it is evidence of each and every element needed to constitute the offense admitted as a crime.[10]

The consent to a court order is conclusive in that cause, but in another cause the consenting party would not be estopped from showing the motive and intention of the consent.[11] The motion of a party in arrest of judgment on the ground that the descrip-

[2] Skelton v. Hawling, 1 Wils. 258; Dawes v. McMichael, 6 Paige (N. Y.) Ch. 139; McGowen v. Young, 2 Stew. (Ala.) 276.

[3] Nicholson v. Snyder, 97 Md. 415, 55 A. 484, 486.

[4] McDonald v. Nugent, 122 Iowa, 651, 98 N. W. 506.

[5] Caldwell v. Drummond (Iowa, 1903), 96 N. W. 1122; Schultz v. Culbertson (Wis., 1905), 103 N. W. 234; Alabama Midland R. R. Co. v. Guilford, 119 Ga. 523, 46 S. E. 655.

[6] Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689, 89 Am. St. Rep. 854.

[7] Wilson v. Phoenix Powder Manfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

[8] Pratt v. Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602, where a defendant in opening admitted the plaintiff's legal title to a promissory note.

[9] Missouri & K. Telephone Co. v. Vandevort, 67 Kan. 269, 72 Pac. 771.

[10] Wagner v. Gibbs, 80 Miss. 53, 31 South, 434, 92 Am. State Rep. 598; Wesnieski v. Vank (Neb., 1904), 99 N. W. 258. Malicious prosecution.

[11] In re Duncan, 64 S. C. 461, 42 S. E. 433.

tion of his land in a commissioner's report was too indefinite is an admission of record that the description was defective.[12] Testimony at a former trial is admissible as an admission against the party, although it is not contradictory of any statement made by him in a second trial.[13] But an admission made in the pleadings in one action is not admissible in another, *unless precisely the same matter is being litigated in such other action.*[14] Thus a libel filed by a party to another suit cannot ordinarily be given in evidence against him as an admission; but if he brought the suit as a trustee, and recovered, the *cestuis que trust* may put the whole record in evidence to show the recovery and the title on which it rested.[15] A bill in equity is not evidence against the complainant in a trial at law,[16] nor is a bill brought by an administrator admissible against the estate.[17] So it seems that a bill for an injunction not filed as an original, the order upon which has never been complied with, cannot be considered as a record of court, so as of itself to be evidence in a chancery suit beween the same parties.[18] And the same rule has been adopted as to a bill of discovery which has been withdrawn before any answer to it has been filed,[19] or where the bill and answer are offered together.[20]

It may be said to be the general rule, that, *whenever a material averment well pleaded is passed over by the adverse party without*

[12] Ager v. State, 162 Ind. 538, 70 N. E. R. 808.

[13] Lush v. Parkersburg (Iowa, 1905), 104 N. W. 336.

[14] Carter v. James, 13 M. & W. 137; Church v. Sheton, 2 Curt. (U. S.) 271; Melvin v. Whitney, 13 Pick. (Mass.) 184. But see Cooper v. Day, 1 Rich. (S. C.) Eq. 25; Van Rensselaer v. Aikin, 22 Wend. (N. Y.) 549; Henderson v. Cargill, 31 Miss. 367.

[15] Church v. Shelton, *ante*. In Stump v. Henry, 6 Md. 201, at a sheriff's sale of real estate under an execution upon a judgment against R., A. B. and C. became purchasers. F. bought the shares of B. and C., agreeing with R. to convey them to him upon payment of the purchase-money. At a trustee's sale, S., by order of the chancellor, purchased all the right of F. and R. in said land. R. filed his bill prior to the trustee's sale, making the heirs of F. defendants, for the execution of the agreement. An heir of F. filed a cross-bill against R. A bill was then filed by the heirs at law of A. (making S. defendant), who claimed title to an undivided third part of said land, and S. in his answer relied upon the title of R. and F. It was held that the bill of R. against F., since it was sworn to by the complainant, and since his answer in the cross-bill admitted its filing, might be used in evidence in regard to the title under which he held the land.

[16] Rees v. Lawless, 4 Litt. (Ky.) 218. But *contra* see McLemore v. Nuckolls, 37 Ala. 662.

[17] Crandall v. Gallop, 12 Conn. 365.

[18] Driver v. Fortner, 5 Port. (Ala.) 9.

[19] Dean v. Davies, 12 Mo. 112.

[20] Clark v. Depew, 25 Penn. St. 509.

denial, whether by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to ge by default, it is thereby, for the purpose of pleading, if not for the purpose of trial before the jury, conclusively admitted.[21] But it is only as to *material* allegations that the rule operates, and therefore a demurrer admits no more than is well pleaded;[22] and, if a plea denies a particular fact alleged in the declaration, it does not thereby admit all the immaterial statements which the pleader has chosen to introduce as part of the plaintiff's case.[23] Thus, where a declaration in assumpsit,—after stating that the defendants were *owners* of a vessel, on which the plaintiff caused to be shipped some potatoes to be carried by them, *as owners* of the vessel, to Liverpool; in consideration whereof, and of freight, they promised to carry the potatoes safely *as aforesaid,*—alleged as a breach, that through their negligence they were damaged, it was held that the plea of *non assumpserunt* did not admit that the defendants were owners, so as to raise the inference that the captain was their agent, the allegation of ownership being regarded as wholly immaterial. The declaration would have been equally good had there been no such allegation; because the statement that, in consideration of the plaintiff having shipped the goods, and of the freight, the defendants promised to carry them safely, when coupled with an allegation that the goods were not safely carried, was sufficient to make a complete case of liability against the defendants.[24]

An admission *in the record* does not have the effect of shifting the burden of proof, but is treated as a mere *waiver of requiring proof of those parts of the record which are not denied, the party being willing to rest his claim on the other facts in dispute;* but if any inferences are to be drawn by the jury, *they must have the facts from which such inferences are to be drawn proved like any other facts.*[25]

[21] Com. Dig. Pleader, G. 2; Stephens on Plead. 248; Jones v. Brown, 1 Bing. N. C. 484; De Gaillon v. L'Aigle, 1 B. & P. 368; Stephens v. Pell, 2 Dowl. 629; Green v. Hearne, 3 T. R. 301.

[22] Van Landau v. Turner, 6 Q. B. 785.

[23] Bennion v. Davison, 3 M. & W. 179; Dunford v. Trattles, 12 M. & W. 534.

[24] Bennion v. Davison, 3 M. &. W. 179, 182, 183; Dunford v. Trattles, 12 M. & W. 532.

[25] Edmunds v. Groves, 2 M. & W. 642, 645; Bennion v. Davison, 3 M. & W. 183; Edmunds v. Groves, 2 M. & W. 643. In Fearn v. Filica, 7 M. & Gr. 517, CRESSWELL, J., observed, with reference to this doctrine, "I take it that what my brother Alderson meant was, that the fact

But the Court of Queen's Bench has held that an admission in the pleadings, whether expressly or by omitting to traverse an allegation, is an admission for all purposes as to the issues arising from that pleading, whether the facts relate to the parties or to third persons, if the allegation so admitted is material.[26]

Sec. 168. Effect of plead of General Issue, Etc.

The general issue or other plea in bar admits the character in which the plaintiff sues;[1] as, where a person sues as administrator, that he is administrator;[2] and if he sues as administrator *de bonis non*[3] or *cum testamento annexo*,[4] such plea admits that the plaintiff legally possesses that capacity, and the admission is conclusive,[5] and the defendant cannot question the regularity or sufficiency of his appointment;[6] and the same rule applies in all cases where a person sues in an official capacity, as where he sues as State treasurer.[7]

So, where a corporation sues, a plea of the general issue or in bar admits the corporate capacity of the plaintiff, and dispenses with proof of the character, organization, etc.,[8] and this is the rule even as to foreign corporations.[9] So where the plaintiff sues as guardian.[10] So it admits the residence of the plaintiff, as if he sets himself up as a foreigner or a citizen of a certain State for the purpose of giving jurisdiction to the Federal courts.[11] The

put in issue was to be proved just as if no admission were made on the record; that is, that an admission in the record is not to be taken to prove the issue;" and his Lordship added. "If the rule is not as stated by ALDERSON, B., this singular state of circumstances might arise,—a counsel might ask the jury from the mere state of the record to infer a fact which was directly in issue." Id. 518.

[1] Bingham v. Stanley, 29 B. 121.

[2] Carpenter v. Whitman, 15 John. (N. Y.) 208; State Treasurer v. Wiggins, 1 McCord (S. C.) 468.

[3] Fraux v. Fraux, 2 N. J. L. 166; Smith v. Ludlow, Anth. (N. Y.) 127.

[4] Floyd v. Breckenridge, 4 Bibb (Ky.), 14.

[5] Champlin v. Tilley, 4 Day (Conn.), 303.

[6] Henderson v. Clark, 4 Bibb (Ky.) 391.

[7] Champlin v. Tilley, *ante;* Henderson v. Clark, *ante.*

[8] State Treasurer v. Wiggins, 1 McCord (S. C.), 468.

[9] Prop. of Kennebec Purchase v. Call, 1 Mass. 483; Conrad v. Atlantic Ins. Co., 1 Pet. (U. S. C. C.) 388.

[10] Taylor v. Bank, 7 Mon. (Ky.) 576; Society for Propagation of the Gospel, etc., v. Pawlet, 4 Pet. (U. S.) 480.

[11] Harper v. Distrehan, 2 Mart. (La.) 389.

[12] De Wolf v. Rabaud, 1 Pet. (U. S. C. C.) 476; and the same rule prevails where the plaintiff sets himself up as a citizen of the State in which he sues for the purpose of obtaining certain advantages which can only be enjoyed by citizens of the State. Shivers v. Wilson, 5 H. & J. (Md.) 130.

general issue in a writ of entry admits the defendant's tenancy of the freehold.[12] In dower, denial of the marriage or seizin admits all other material allegations, as a demand of dower, etc.,[13] and a denial of marriage admits the seizin.[14] In a writ of right the *mise* precludes all evidence of non-tenure,[15] and in formedon in the descender, *non devastavit* admits all the material facts in the court except the demise.[16] But in replevin *non cepit in alio loco* does not admit the taking.[17]

In assumpsit, by the assignee of an insolvent, the general issue was held not to supersede the necessity of proving that the plaintiff was assignee.[18] And so of an insolvent's trustees.[19] And where sealed contracts are made negotiable by statute, *non est factum* does not admit the assignment.[20]

The plea of *non est factum* to an action of debt or covenant puts the execution of the deed alone in issue; and the plaintiff need not prove any averments, except such as relate to the validity of the deed.[21]

[12] Killeran v. Brown, 4 Mass. 443; Mills v. Pierce, 2 N. H. 9.

[13] Ayer v. Spring, 10 Mass. 80.

[14] Fitzgerald v. Garvin, Charlt. (Ga.) 281.

[15] Baller v. Peterborough, 3 Rand. (Va.) 563.

[16] Dudley v. Sumner, 5 Mass. 438.

[17] Williams v. Welch, 5 Wend. (N. Y.) 290.

[18] Best v. Strong, 2 Wend. (N. Y.) 319.

[19] Winchester v. Union Bank of Maryland, 2 G. & J. (Md.) 73.

[20] McMurty v. Campbell, 1 Hamm. (Ohio) 262.

[21] Under this rule it was held that in covenant to pay on receiving one-third of the plaintiff's dower, *non est factum* admitted that the condition was fulfilled, and dispensed with proof of this at the trial. Gardner v. Gardner, 10 John. (N. Y.) 47. So of eviction, alleged in covenant for quiet enjoyment, Kane v. Sanger, 14 John. (N. Y.) 89, so of assets in covenant against an heir, the declaration averring assets, Woodford v. Pendleton, 1 H. & M. (Va.) 303, so that the bond declared on is not voidable as being given contrary to certain legislative provisions, for this must be pleaded specially. Commissioners v. Hanion, 1 N. & M'C. (S. C.) 554, 555. So in some States, where an equitable defense is admissible, *non est factum* admits that the bond was obtained without fraud or misrepresentation, and upon full consideration, which has not failed, etc.; and if the contrary be intended as a defense, it must be specially pleaded, or notice must be given. Adams v. Wylie, 1 N. & M'C. (S. C.) 78; Bollinger v. Thurston, 2 Rep. Const. Ct. (S. C.) 447. So this plea admits the amount averred to have been awarded, in an action upon an arbitration bond. Graham v. Allen, 2 N. & M'C. (S. C.) 492. So *non est factum* to a constable's surety bond, though with notice that the plaintiff (relator) had been satisfied by bidding in property, does not warrant evidence of declarations made by him, calculated to lull the constable into security; the relator thus bringing the damage upon himself, and leaving the constable free from blame. People v. Holmes, 5 Wend. (N. Y.) 191. So in an action by the lessee against his lessor on the covenant of title, *non est factum* admits the want of title, Barney v. Keith, 6 Wend. (N.

A plea of justification in an action of malicious prosecution admits the proceedings set out in the declaration, and throws the onus upon the defendant, even of showing probable cause.[22] In replevin, a plea of property out of the plaintiff admits the taking,[23] and *non cepit* admits property in plaintiff.[24] A *general* plea of tender to two counts, one on an account stated, and another on a *quantum meruit,* is conclusive that a claim for both causes exists, and cannot be afterwards limited to an account stated, or to a special agreement for a sum certain.[25] A plea of payment to an action of assumpsit admits the cause of action;[26] to an action upon an award, it admits the award;[27] to an action on judgment, it admits the judgment.[28] *Liberum tenementum* conclusively admits the trespass, and the plaintiff's possession of the close;[29] *solvit ad diem* admits the execution of the bond,[30] and on an issue of property or not property, the taking cannot be questioned.[31] A plea of performance to an injunction bond admits the dissolution of the injunction, and all other facts well pleaded,[32] and a plea of set-off admits the plaintiff's demand.[33] An averment that a bond is discharged admits that it was executed,[34] and

Y.) 555; in covenant for money, alleging non-payment and averring performance of conditions precedent, as the procuring and delivery of patents, etc., it admits the non-payment, and that the conditions were performed, Dale v. Roosevelt, 9 Cow. (N. Y.) 307; Courcier v. Graham, 1 Hamm. (Ohio) 330, in covenant averring notice, it admits the notice, Thomas v. Woods, 4 Cow. (N. Y.) 173; in debt on a bail bond assigned by the sheriff, it admits that it was legally assigned, Soloman v. Evans, 3 M'Cord (S. C.), 274; in covenant for non-delivery of slaves on demand, it admits the demand, Mitchell v. De Graffenreid, 1 Harp. (S. C.) 450; in debt on an appeal bond, it admits all the averments as to matters of record, non-payment, etc., Legg v. Robinson, 7 Wend. (N. Y.) 194; Hamilton v. Averill, 11 id. 624, and the want of title as well as the eviction, etc., in an action on a covenant of warranty, Cooper v. Watson, 10 Wend. (N. Y.) 202, but not any fact which is not averred; as in an action on a replevin bond that the writ *de ret. hab.* was returned unsatisfied, this not being averred. Cowdin v. Stanton, 12 Wend. (N. Y.) 120.

[22] Morris v. Corson, 7 Cow. (N. Y.) 281.

[23] Hume v. Gillespie, 3 Mon. (Ky.) 184.

[24] Harper v. Baker, 3 Mon. (Ky.) 421.

[25] Huntington v. American Bank, 6 Pick. (Mass.) 340.

[26] Haley v. Callar, 1 Ala. 63.

[27] Fraux v. Fraux, 2 N. J. L. 166.

[28] Raymond v. Wheeler, 9 Cow. (N. Y.) 295.

[29] Singleton v. Millet, 1 N. & M'C. (S. C.) 355; Caruth v. Allen, 2 M'Cord (S. C.), 226.

[30] Sandford v. Hunt, 1 C. & D. 118.

[31] Hume v. Gillespie, 3 Mon. (Ky.) 184.

[32] Harrison v. Park, 1 J. J. Mar. (Ky.) 170, 172.

[33] Morgan v. Boone, 1 J. J. Mar. (Ky.) 585, 586.

[34] Naba v. Carlin, 3 La. 373.

an answer insisting on payment admits the allegation in the petition, of goods sold to the defendant.[35]

But it should be remembered that a plea, though it admits the cause of action, does not admit its amount; and so of amounts admitted by affirmative pleading in any stage, as by replication, etc., unless the precise sum be made material by the pleadings. In this respect, the affirmative plea is like a judgment by default or on demurrer, where damages must still be assessed.[36] A good instance is the plea of payment in an action of assumpsit.[37]

To the usual plea of an insolvent discharge, the replication denied that the defendant was discharged as he alleged. It was held that it was necessary to show jurisdiction, as this was admitted by the replication; and so was the filing of the petition, the same as any other fact not denied.[38] The replication of a new promise to a plea of infancy admits the infancy.[39]

[35] Akin v. Bedford, 4 La. 615.

[36] Waggener v. Bells, 4 Mon. (Ky.) 7, 11, 12.

[37] Haley v. Callar, 1 Ala. 63.

[38] Andrews v. Pledger, 4 C. & P. 381.

[39] Goodsell v. Myers, 3 Wend. (N. Y.) 479.

It was held that where the defendant went to trial without a rejoinder, the facts stated in the replication should be taken as admitted, although the attention of the court and jury was not called to the state of the pleadings; and there being a verdict for the defendant, a new trial was, for that reason, granted. Porter v. Kent, 1 M'Cord (S. C.), 205. Most courts would probably have amended the isue and retained the verdict. To a plea of set-off, and that the plaintiff got a transfer of the note to avoid the set-off, a replication that the note was the plaintiff's property was held to admit both the set-off and the fraudulent transfer. Savage v. Davis, 7 Wend. (N. Y.) 223. The plea of non-tenure to an avowry for rent, setting up a seizin and deducing title, admits the seizin and demise. Bloomer v. Juhel, 8 Wend. (N. Y.) 408. *Riens in arrere* admits the defendant's title. Bloomer v. Juhel, *ante*. To an avowry and cognizance setting forth a lease and rent, by two defendants, averring that B., one of the defendants, distrained as bailiff of A., the other, the plaintiff pleaded, simply denying that B. was bailiff, and held that this admitted the lease and the amount of rent, as set forth. Solomon v. Harvey, 1 N. & M'C. (S. C.) 81. *Qui non negat, fatetur*, is the maxim in respect to pleading. All material allegations not denied are admitted. Thus, where in trespass *de bonis asportatis* the defendant pleaded that he assisted the sheriff in taking the goods in execution against the plaintiff, and the plaintiff replied a previous *ca. sa.*, an arrest and a voluntary escape, and that the defendant then sued out the execution in question, and the rejoinder was that this execution was sued out by another, and not the defendant, this was held to admit the escape and other material allegations, except that this execution was sued out by the defendant. Cheever v. Mirrick, 2 N. H. 376. On replication setting forth a code of by-laws and alleging a breach, an issue on the breach admits the by-laws. Union Bank of Maryland v. Ridgley, 1 H. & G. (Md.) 324. In assumpsit, the defendant pleaded a set-off of $2,500; replication that the defendant was in debt to the plaintiff $3,000, and paid the plaintiff $2,500 in part thereof;

The form of the issue indicates the proof which is admissible under the pleadings; if the complaint alleges that the defendants opened a ditch in the highway, and that plaintiff, without any fault or want of care on his part, fell into it, and the answer denies that the plaintiff without any fault or want of care on his part did fall therein, the issue involves the fact of his falling into it, and plaintiff's care or want of care.[40] And if the complaint is for work and labor performed, and goods sold and delivered, claiming $197.25, and the answer alleges that the goods were furnished, and the services rendered under an agreement at stipulated prices, amounting to $181.00, but that they were worth no more than $173.00, the defendant may show the work done under a contract, and that there were defects in it.[41]

The tacit admission of a material fact by pleading over and traversing some other material allegation, will not operate in the cause to the prejudice of the party making it, *if he succeeds* on the issue raised in his traverse.[42]

rejoinder, that he had not owed the $3,000; the plaintiff has the onus, for he has admitted by the replication the payment of the $2,500. Waggener v. The Bells, 4 Mon. (Ky.) 7, 11. If the plaintiff reads a part of the defendant's answer in evidence without objection, the facts stated in the answer and so read may be taken as proved, though the answer being denied in the reply, could not have been read if objected to. People v. Norton, 9 N. Y. 176. Under an answer containing a general denial of all the allegations of the complaint, which is for labor and services, evidence of payment or partial payment is inadmissible. McKying v. Bull, 16 N. Y. 297. Where the complaint, on a promissory note, alleges that defendants made the same and have not paid it, the answer alleging payment forms a direct issue; so held under the code as it stood in 1848. Van Giesen v. Van Giesen, 10 N. Y. 316. An award is also new matter which cannot be proved unless it is set up in the answer. Braill v. Isham, 12 N. Y. 9, 17. So is the defense of a former suit pending. Gardner v. Clarke, 21 N. Y. 399. Partial defenses may be pleaded. 11 N. Y. 347; 16 N. Y. 297. If the plaintiff reads a part of the defendant's answer in proof of a fact stated in it, then the defendant has a right to insist that the whole answer be read and taken together. Gildersleeve v. Mahoney, 5 Duer (N. Y.), 383. In pleading a bankrupt's discharge it is held necessary to show that the court had jurisdiction to grant it, by averring the existence of the facts on which jurisdiction depended. But when the discharge is offered in evidence, jurisdiction to grant it should be presumed until the contrary appears. Ruckman v. Cowell, 1 N. Y. 505. When the discharge is given in evidence without having been pleaded, evidence is admissible to impeach it for fraud. Id. 507.

[40] Wall v. Buffalo Water Works Co., 18 N. Y. 119.

[41] Maffat v. Sackett, 18 N. Y. 522.

[42] Robins v. Maidstone, 4 Q. B. 811.

Sec. 169. Omitting to traverse.

The omission to traverse a *material* allegation so far admits it that the party pleading over cannot disprove it.[1] But, although a declaration or plea in an action may, in certain cases, be used as a conclusive admission in another, it *can never be used by the opponent as evidence to establish his case on another issue on the same record.*[2] For instance, if not guilty and a justification is pleaded to a declaration in trespass, the admission of the trespass in the justification will not entitle the plaintiff to a verdict on the plea of not guilty; because, whatever issues are joined upon any counts or pleas are to be tried by the jury distinctly from each other.[3] So strict is this rule, that a special plea, held bad on demurrer, cannot be read by the plaintiff at the trial of the general issue, as a direct admission by the defendant of the statements therein contained, though the jury is summoned to assess the damages on the demurrer, as well as to try the cause on the general issue;[4] neither can the defendant, under similar circumstances, advert to the plea, and use the demurrer as an indirect admission by the plaintiff of the facts stated in such plea.[5] So, where a declaration contained two inconsistent counts, on the second of which the defendant paid money into court, which the plaintiff accepted, it was held that such count, and the proceedings thereon, could not be read to the jury by the defendant as evidence to negative an allegation in the first count.[6] It was contended, in that case, that taking the money out of court in satisfaction of the matter in the second count was an *act* of the plaintiff apparent on the record, of which the defendant was entitled to avail himself. But the court held that this part of the pleading was not before the jury.[7]

Sec. 170. New Assignment.

A new assignment does not admit the truth of those matters stated in the plea which it does not pretend to traverse; for,

[1] Bonzi v. Stewart, 4 M. & G. 295; Carter v. James, 13 M. & W. 145; Cawlinshaw v. Cheslyn, 1 C. & J. 481.

[2] Knight v. M'Douall, 12 A. & E. 438. See Hyde v. Watts, 12 M. & W. 254, as to when the defects in one pleading may be cured by admissions contained in the pleadings of the adverse party.

[3] Gould v. Oliver, 2 M. & G. 234; Harington v. Macmorris, 5 Taunt. 228.

[4] Firmi v. Crucifix, 5 C. & P. 98; Montgomery v. Richardson, 5 id. 247.

[5] Ingram v. Lawson, 2 M. & R. 253.

[6] Gould v. Oliver, 2 M. & G. 208.

[7] Gould v. Oliver, ante.

although a distinction for some purposes may very properly be drawn between collateral and continuous pleading, and it may perhaps be contended with truth that a new assignment, to a certain extent, falls within the latter class, yet it is obvious that the plaintiff, by adopting this course of pleading, intends to waive all inquiry respecting the facts stated in the plea, as not applying to the true cause of action. The effect, therefore, of a new assignment is not strictly to admit the truth of these facts, but to withdraw them entirely from consideration, as forming any part of the subject-matter of the action, and thus, on the one hand, to prevent the plaintiff from complaining of them, and, on the other, to preclude the defendant from relying on them in the support of the issue raised on the new assignment. They are, in point of fact, to be regarded as if they were struck out of the record, and the true grounds of complaint are to be sought in the explanation of the declaration which the new assignment contains.[1] For some purposes, indeed, the matters stated in the plea, and not disputed by the new assignment, will be noticed by the court; as, for instance, if to an action for assault the defendant justifies, and the plaintiff new assigns another assault on a different occasion, the latter must either prove both assaults, or at least show that the one of which he complains in his new assignment is substantially different from that alleged in the plea; and so, if in an action of trespass, *quare clausum fregit,* a justification is pleaded under a right of way, and a trespass *extra viam* is new assigned, the plaintiff must prove at the trial that such last-named trespass was in fact committed; but in both these cases the proof is required, not so much on account of any admission assumed to have been made by the plaintiff, as because it directly establishes the issue which has been raised by the new assignment.[2]

The rule does not apply to cases where the issue found being immaterial, the court have to determine whether they will grant a *repleader,* or will allow the plaintiff to enter up judgment *non obstante veredicto,* or the defendant to arrest the judgment.[3] Here

[1] Norman v. Wescombe, 2 M. & W. 349, 360, 361; Dand v. Kingscote, 6 M. & W. 197; Brancker v. Molyneux, 1 M. & G. 710; Stephens on Pl. 261.

[2] Darby v. Smith, 2 M. & Rob. 184; Oakley v. Davis, 16 East, 86. See Bolton v. Sherman, 2 M. & W. 399; Alston v. Mills, 9 Ad. & El. 248.

[3] Gwynne v. Burnell, 6 Bing. N. C. 479.

a distinction prevails between an express admission or a pleading in confession and avoidance on the one hand, and an implied admission from traversing other facts on the other, the latter not being regarded by the court in the light of an admission at all.[4] Thus it has been held that judgment *non obstante veredicto* can be awarded only on a pleading by the defendant in confession and avoidance, and not on an implied confession in a rejoinder of that part of a replication which it does not answer;[5] and this seems to lead to the conclusion that judgment for the plaintiff cannot be arrested on the ground that the traverse of a part of a plea contains an implied confession of the residue. The proper course seems, in both cases, to award a repleader.[6] The *rule in equity with respect to admissions* in pleading is different from that at common law; a demurrer being regarded by courts of equity as simply raising the question of law, without any admission of the truth of the allegations contained in the bill—so that if the demurrer be overruled, an answer may still be put in; and a plea being merely a statement of circumstances sufficient to show that, supposing the facts to be true, the defendant is not bound to answer. It follows that, in a future action between the same parties, neither the demurrer nor plea can be received in evidence as amounting to an admission of the facts alleged in the bill.[7]

Sec. 171. Admissions acted upon by others to their Prejudice.

Where an admission has been acted upon by another, the person making it cannot deny it, where such denial would operate prejudicially to the person who has acted upon it.

This rule is illustrated in numerous ways. Thus, if a man cohabits with a woman and treats and presents her to the world as his wife, he is estopped from denying that she is his wife as against those who have furnished her with goods upon the faith of

[4] Atkinson v. Davies, 11 M. & W. 240.

[5] Gwynne v. Burnell, 6 Bing. N. C. 453; 1 Scott, N. R. 711, S. C.

[6] Atkinson v. Davies, 11 M. & W. 236, 242, where the court explains and adopts the rule of law laid down in Gwynn v. Burnell. These cases overrule the dictum of the Court of Common Pleas, as reported in Rand v. Vaughan, 1 Bing. N. C. 769; 1 Scott, 670. S. C. See, also, Pitts or Witts v. Polehampton, 3 Salk. 305; 1 Lord Raym. 391, S. C.; Plummer v. Lee, 2 M. & W. 496; 5 Dowl. 755, S. C.; Gordon v. Ellis, 2 Dowl. & L. 308, 318, 319.

[7] Tompkins v. Ashby, M. & M. 32.

the relation;[1] and a woman who has lived with a man under such circumstances is, so far as the rights of third persons are affected thereby, estopped from denying that she is his wife.[2] But where a woman is really married to a man, and she has obtained credit upon a declaration by her that she is a single woman, it is held that she is not estopped from setting up her marriage in defense.[3]

[1] Munroe v. De Chamaut, 4 Camp. 215; Watson v. Threlkeld, 2 Esp. 637.

[2] Divoll v. Leadbitter, 3 Pick. (Mass.) 220; Mace v. Cadell, 1 Camp. 233; Batthews v. Galindo, 4 Bing. 613.

[3] Glenister v. Thynne, Easter T. 1847. CATEREDGE, J.

Where a person knowingly permits his name to be used in a firm under such circumstances of publicity as to warrant a jury in finding that a creditor knew of it and believed him to be a partner, he is liable to such stranger in all the transactions in which he gave credit to the firm upon the faith of his being a partner. Dickinson v. Volpy, 10 B. & C. 122; Guidon v. Robson, 2 Camp. 302.

So, if a party has taken advantage of, or voluntarily acted under, the bankrupt or insolvent laws, he shall not be permitted, as against parties to the proceedings, to deny their regularity. Like v. Howe, 6 Esp. 20; Clarke v. Clarke, 6 id. 61; Gouldie v. Gunston, 4 Camp. 381; Watson v. Wace, 5 B. & C. 153, explained in Heane v. Rogers, 9 B. & C. 586, 587; Mercer v. Wise, 3 Esp. 219; Harmar v. Davis, 7 Taunt. 577; Flower v. Herbert, 2 Ves. Sr. 326. So, if a person having a right to an estate permits or encourages a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, 3 Sugden Ven. & Pur. 428; Sandys v. Hodgson, 10 Ad. & El. 476; and the same doctrine applies to personal property. Pickard v. Sears, 6 Ad. & El. 469; Gregg v. Wells, 10 Ad. & El. 90; Coles v. Bank of England, 10 Ad. & El. 437. Trespass is not maintainable against a sheriff's officer who executes process against a man by a wrong name, either by taking his person, or seizing his goods, if before the process be sued out, he is asked his name, and gives such wrong one; as to a *ca. sa.*, see Morgans v. Bridges, 1 B. & A. 650, 651; Magnay v. Fisher, 5 M. & G. 778, 787. This last case overrules Coote v. Leighworth, Sir Fra. Moore, 557, and a dictum of Lord Hale in Thurbane, Hardres, 323. As to a *fi. fa.*, see Price v. Harwood, 3 Camp. 108; Fisher v. Magnay, 5 M. & G. 787; Reeves v. Slater, 7 B. & C. 486; and if a party, who has entered into a bond by a wrong name, is sued in that name, he cannot cause the declaration to be amended at the cost of the plaintiff, Hyckman v. Shotbolt, 3 Dyer, 279, b.; R. v. Wooldale, 6 Q. B. 566; Mayby v. Shepherd, Cro. Jac. 640; Williams v. Bryant, 5 M. & W. 447, and he is estopped from denying that the name in which he was sued was his real name. So, although a breach of covenant can in no case be justified by a parol license to break it, Doe v. Gladwin, 6 Q. B. 953, 962; West v. Blakeway, 2 M. & G. 729, yet a forfeiture occasioned by it may sometimes be waived by the conduct of the covenantee. Thus where there is a covenant to insure by the tenant, which is qualified by an option given to the landlord to insure if the tenant makes default, and to add the premiums to his rent, in ejectment for a forfeiture for not insuring, the defendant may defeat the action by proving that the landlord represented to him that he had exercised the power, and had himself insured the premises. Doe v. Sutton, 9 C. & P. 706; Doe v. Gladwin, 6 Q. B. 962, 963; Doe v. Rowe, 2 C. & P. 246. So a tenant, who has paid rent, and acted as such, is not permitted to set up a superior title of a third person against his lessor, in bar of an eject-

This rule also applies to acceptors of bills, and in an action against the *acceptor* the defendant cannot show that his signature has been forged, *if he has accredited the bill, and induced the plaintiff to take it, by saying that the acceptance was his, and that the bill would be duly paid.*[4]

The *acceptance* of a bill of exchange is also treated as a *conclusive admission,* as against the acceptor, of the signature of the drawer,[5] and of his capacity to draw;[6] and if the bill is payable to the order of the drawer, of his capacity to indorse;[7] and if it is

ment brought by him; for he derived the possession from him as his tenant, and will not be allowed to repudiate that relation. This doctrine applies to the relation of bailor and bailee, and principal and agent; the rule being that *bailees* or *agents* cannot dispute the titles of their bailors or principals. Dixon v. Hammond, 2 B. & A. 310, 313; Story on Agency, § 217; Phillips v. Hall, 8 Wend. (N. Y.) 610; Drown v. Smith, 3 N. H. 299; Eastman v. Tuttle, 1 Cow. (N. Y.) 248; M'Neil v. Philip, 1 M'Cord (S. C.), 392; Chapman v. Searle, 3 Pick. (Mass.) 38, 44; Jewett v. Torry, 11 Mass. 219; Lyman v. Lyman, 11 id. 317; Story on Bailm., § 102.

Consequently, if a warehouseman, wharfinger, banker, attorney, agent, or other depositary of goods or moneys, has once acknowledged the title of a person as his bailor or principal, and has agreed to hold the goods or moneys subject to his order, or to sell the goods and to account for the proceeds, he will be estopped from setting up the title of a third person to the same goods or moneys, or from otherwise defeating the rights of his bailor or principal, against his own manifest obligations to him. Gosling v. Birnie, 7 Bing. 339; Stonard v. Dunkin, 2 Camp. 344; Harman v. Anderson, 2 id. 243; Hawes v. Watson, 2 B. & C. 540; Dixon v. Hammond, 2 B. & A. 310; Roberts v. Ogilvy, 9 Price, 269; Farringdon v. Clerk, 3 Doug. 124; Holl v. Griffin, 10 Bing. 246; Nickolson v. Knowles, 5 Mad. 47; Evans v. Nichol, 3 M. & G. 614. But an exception is made where the bailor or principal has obtained the goods fraudulently or tortiously from the third person, Harman v. Willcock, 9 Bing. 382, n, if the defendant shows that he was unacquainted with the circumstances when he made the admission, Gosling v. Birnie, 7 Bing. 346, and that such third person has actually made a claim to the goods or moneys in question. Betterley v. Reed, 4 Q. B. 511, 517, 518. The bailor's title may be impugned if the circumstances are such as to show that he, in connection with some third person, has practiced a fraud on the bailee, by representing goods to belong to the bailor, which, in fact, were the property of such third person, if additional proof is given that the defendant, in consequence of the fraudulent misrepresentation, has sustained any real injury. Scott v. Crawford, 4 M. & G. 1031. On the same principle, a vendor, who has sold goods to a party as a sole purchaser, and has directed his factors to weigh them over to such party, and to enter them in his name in their books, cannot, after such sale and transfer, dispute his title as sole proprietor, or detain the goods, on the authority of a third person, who claims to be a joint purchaser. Kieran v. Sandars, 6 Ad. & El. 515.

[4] Leach v. Buchanan, 4 Esp. 226; Sanderson v. Collman, 4 M. & G. 222.

[5] Sanderson v. Collman, 4 M. & G. 209; Bass v. Clive, 4 M. & S. 13.

[6] Id. See Haly v. Lane, 2 Atk. 182.

[7] Taylor v. Croker, 4 Esp. 187; Pitt v. Chappelow, 8 M. & W. 616; Drayton v. Dale, 2 B. & C. 293; Sanderson v. Collman, 4 M. & G. 218.

drawn by procuration, of the authority of the agent to draw in the name of the principal;[8] and it is immaterial whether the bill is drawn before or after the acceptance.[9] There is, however, generally no such admission on the part of the acceptor, of the genuineness of the signature of the payee, although he is the same party as the drawer,[10] or of any other indorser; and this, although at the time of the acceptance, the indorsements were on the bill.[11]

Upon the same principle an *indorsement* by the payee of a promissory note is a conclusive admission of the handwriting of the maker,[12] but not of any preceding indorser.[13]

[8] Robinson v. Yarrow, 7 Taunt. 455; Jones v. Turnour, 4 C. & P. 204.

[9] Schultz v. Astley, 2 Bing. N. C. 544.

[10] Macferson v. Thoytes, Pea. 20; Bosanquet v. Anderson, 6 Esp. 44; Cooper v. Meyer, 10 B. & C. 471.

[11] Smith v. Chester, 1 T. R. 654.

Neither does the acceptance admit that an agent who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same. Robinson v. Yarrow, 7 Taunt. 455; Beeman v. Duck, 11 M. & W. 255. So, if on a bill payable to the order of the drawer the name of a *real* person as drawer and indorser is *forged*, it seems that the mere acceptance of the bill, in *ignorance* of the forgery, will not preclude the acceptor from denying the genuineness of the indorsement, though it be in the same handwriting as the drawing, which he is bound to admit; Beeman v. Duck, 11 M. & W. 251, 255; but if the acceptor, with *knowledge* of the forgery, puts the bill in circulation, he will be estopped from disputing the validity of the indorsement equally with that of the drawing, and the same rule prevails if the bill is drawn in a wholly *fictitious* name, and the handwriting of the indorsement is the same as that of the drawing, and the acceptor will be estopped from denying it, because he admits that the bill is drawn by *somebody*, that is, by the person who indorses in the same handwriting, and the fair construction to be put on his undertaking is, that he will pay to the signature of the same person who signed for the drawer. Cooper v. Meyer, 10 B. & C. 468, 471; Beeman v. Duck, 11 M. & W. 253-256.

The reasons usually assigned for these distinctions are, that as the acceptor is only presumed to be acquainted with the handwriting of the drawer, it is sufficient if he ascertains that his signature is genuine, and that he is not bound to look at the back of the bill at all; and that if he was, he could not be supposed to know the handwriting of indorsers who would probably be strangers to him; and that a different rule would raise nice questions of fact in every case, as to whether the bill was indorsed before or after acceptance, and would, consequently, embarrass the circulation of negotiable securities, by rendering the position of acceptors hazardous and undefined. See Story on Bills of Ex., § 263; Robinson v. Yarrow, 7 Taunt. 458; Smith v. Chester, 1 T. R. 654; Canal Bk. v. Bk. of Albany, 1 Hill (N. Y.), 287.

[12] Free v. Hawkins, Holt, N. P. R. 550.

[13] Armani v. Castrique, 13 M. & W. 443. But see Critchlow v. Parry, 2 Camp. 182.

Although an indorsee who sues an indorser may be saved the necessity of proving the prior indorsements, by alleging in the declaration that the defendant indorsed a bill *purporting to be drawn* by the drawer, and indorsed by him to the defendant, yet, if he chooses to aver positively that the bill was drawn by a certain person, it seems that the defendant is still competent in law to deny that fact, though his indorsement is co-

But admissions, which *have not been acted upon,* or by which *the situation of the opposite party has not been prejudiced or altered,* although receivable in evidence against the parties making them, are not conclusive.[14]

In some few cases connected with the administration of public

gent, and almost irresistible, evidence of its truth. Armani v. Castrique, 13 M. & W. 449, 450. In those cases where the admission is conclusive, it may either be replied by way of estoppel *in pais,* Sanderson v. Collman, may either be replied to by way of estoppel appears on the pleadings, the party may avail himself of it on demurrer. Armani v. Castrique, 13 M. & W. 451. It makes *no difference* in the operation of this rule, whether the admission was *true* or *false,* or whether it proceeded from *mistake* or *design;* it being the fact that it *has been acted upon* which renders it conclusive. Doe v. Lambly, 2 Esp. 635, 636; Morgans v. Bridges, 1 B. & A. 650; Hall v. White, 3 C. & P. 136; Stables v. Eley, 1 C. & P. 614; Howard v. Tucker, 1 B. & Ad. 712; Salem v. Williams, 8 Wend. (N. Y.) 483; 9 id. 147; Chapman v. Searle, 3 Pick. (Mass.) 38, 44; Den v. Oliver, 3 Hawks (N. C.), 479; Salem Bk. v. Gloucester Bk., 17 Mass. 1; Simmons v. Bradford, 15 Mass. 82; Eaton v. Ogier, 2 Me. 46.

[14] Thus, if A. contracts to sell timber to B., and gives him a delivery order, he may still, on B.'s bankruptcy, meet an action of trover brought by B.'s assignees, by showing that the delivery order was invalid, and therefore did not amount to a constructive delivery of the goods, provided B. has neither paid for them, nor sold them to a third party. Lackington v. Atherton, 7 M. & G. 360. So, if the question merely relates to the admissibility of a witness, whom the defendant has acknowledged to be his wife, Batthews v. Galindo, 3 C. & P. 238, or partner, such acknowledgment will not preclude him from showing that in fact the witness is not incompetent. Brockbank v. Anderson, 7 M. & G. 295; Barker v. Stubbs, 1 M. & G. 44; Russell v. Blake, 2 M. & G. 374; Poole v. Palmer, 9 M. & W. 71; Kell v. Nainby, 10 B. & C. 20; Glossop v. Colman, 1 Stark. 25; Parsons v. Crosby, 5 Esp. 199; Ward v. Haydon, 2 Esp. 552. So, in an action for the escape of a prisoner arrested at the suit of the plaintiff, the defendant, by having received the prisoner into custody, is not estopped from disputing the legality of the custody. Contant v. Chapman, 2 Q. B. 771. Neither will the court treat as conclusive evidence the admission that his trade was a nuisance, by one indicted for setting it up in another place; R. v. Neville, Pea. 91; or the admission by the defendant, in an action for adultery, that the "*teterrima causa*" was the wife of the plaintiff. Morris v. Miller, 4 Burr, 2057; Rigg v. Curgenven, 2 Wils. 399. So, a creditor is not estopped from bringing an action against a sheriff for a false return, by accepting the amount levied on account, and towards the satisfaction, of the debt mentioned in the writ; Holmes v. Clifton, 10 Ad. & El. 673, overruling Beynon v. Garrat, 1 C. & P. 154; and where a person brought an action of trover for a dog, he was held not to be precluded from proving his title to it, though he had previously authorized a third party, against whom the defendant had brought a similar action, to deliver it to the defendant, in the place of paying 50*l.*, which was the alternative directed by the verdict; the third person having, at the time of delivery, demanded back the dog, on behalf of the plaintiff, as his property. In these, and similar cases, no wrong is done to the other party by receiving any legal evidence to show that the admission was erroneous, and by leaving the whole evidence, including the admission, to be weighed by the jury. Sandys v. Hodgson, 10 Ad. & El. 472.

justice, and of government, the admission is held conclusive, on grounds of *public policy*. Thus, in an action for penalties for election bribery, it was held that a man, who had given money to another for his vote, should not be admitted to say that such other person had no right to vote.[15] So, where the owners of a stage coach took up more passengers than were allowed by statute, and an injury was laid as having arisen from overloading, their conduct was held to be conclusive evidence that the accident was occasioned by the cause assigned.[16] So, one who has officiously intermeddled with the goods of another recently deceased, is in favor of creditors, estopped to deny that he is executor.[17] And if an executrix treats the goods of her testator as the property of her husband, she will not be allowed to object to their being taken in execution for her husband's debt.[18]

Sec. 172. Admissions under Oath in Deeds, Etc.

The mere fact that an admission was made under oath does not of itself render it conclusive against the party, but it adds greatly to the weight of the testimony, throwing upon the party making it the burden of showing that it was a case of clear and innocent mistake.[1]

Admissions *in deeds,* as between the parties and their privies, are generally regarded as estoppels, if properly pleaded;[2] and when not technically so, they are entitled to great weight, from the solemnity of their nature.[3] But when offered in evidence by a stranger, the adverse party may repel their effect in the same manner as though they were only parol admissions.[4]

[15] Combe v. Pitt, 3 Burr. 1586, 1590; 1 Wm. Bl. 524, S. C.; Rigg v. Curgenven, 2 Wils. 395.

[16] Israel v. Clark, 4 Esp. 259, *per* Lord KENYON, recognized by Lord ELLENBOROUGH.

[17] Reade's Case, 5 Co. 33, 34; Toller's Law of Exrs., 37-41; 1 Williams Ex. & Ad., 192, 193.

[18] Quick v. Staines, 1 B. & P. 293. See Fenwick v. Laycock, 2 Q. B. 108.

[1] R. v. Clarke, 8 T. R. 220; Thornes v. White, 1 Tyr. & Gr. 110; Doe v. Steel, 3 Camp. 115. Answers in Chancery are always admissible at common law against the party, but do not seem to be held strictly conclusive, merely because they are sworn to. B. N. P. 236, 237; Cameron v. Lightfoot, 2 W. Bl. 1190; Grant v. Jackson, Pea. 203; Studdy v. Sanders, 2 D. & R. 347; De Whelpdale v. Milburn, 5 Price, 485

[2] Fishmongers' Co. v. Robertson, 5 M. & G. 193; Bowman v. Rostron, 2 Ad. & El. 295, n.

[3] Doe v. Stone, 3 C. B. 176.

[4] R. v. Neville, Pea. 91; Woodward v. Larking, 3 Esp. 286; Mayor of Carlisle v. Blamire, 8 East, 487.

Receipts or other mere acknowledgments, given for goods or money, whether on separate papers,[5] or indorsed on deeds,[6] or on negotiable securities;[7] the *adjustment of a loss,* on a policy of insurance, made without full knowledge of all the circumstances, or under a mistake of law or fact, or under any other invalidating circumstances;[8] and *accounts rendered,* such as an attorney's bill,[9] and the like, do not estop the party making them from denying the facts stated therein; and a bill in chancery, if admissible at all against the plaintiff in proof of the admissions it contains, is the feeblest possible evidence, the facts stated therein being frequently little more than the mere suggestions of counsel.[10]

Sec. 173. Admissions by Corporate Officers and Agents.—For other recent cases relating to amdissions by corporate agents, see § 157, *ante.*

The declarations or admissions of individual members of a corporation are not admissible against the corporation, except as to matters in which they have been authorized to act for it,[1] nor are the admissions of directors or other officers of a corporation, *not forming a part of an official act,* admissible to establish an antecedent fact,[2] unless some authority beyond the mere fact of

[5] Skaife v. Jackson, 3 B. & C. 421; Farrar v. Hutchinson, 9 Ad. & El. 641; Wallace v. Kelsall, 7 M. & W. 273. These cases overrule Alner v. George, 1 Camp. 392; Harden v. Gordon, 2 Mason (U. S.), 541, 561; Fuller v. Crittenden, 9 Conn. 401; Ensign v. Webster, 1 Johns. Cas. (N. Y.) 145; Putnam v. Lewis, 8 Johns. (N. Y.) 389; Stackpole v. Arnold, 11 Mass. 27; Tucker v. Maxwell, 11 id. 143; Williamson v. Scott, 17 Mass. 249.

[6] Straton v. Rastall, 2 T. R. 366; Lampon v. Corke, 5 B. & A. 611.

[7] Graves v. Key, 3 B. & Ad. 313.

[8] Reyner v. Hall, 7 Taunt. 725; Shepherd v. Chewter, 1 Camp. 274; Adams v. Sanders, M. & M. 373; Christian v. Coombe, 2 Esp. 489.

[9] Loveridge v. Botham, 1 B. & P. 49; Bacon v. Chesney, 1 Stark. 192, 193, n. *b;* Dawson v. Remnant, 6 Esp. 24; Taylor's Ev., 567, 577.

[10] B. N. P. 235; 2 Ph. Ev. 28; Doe v. Sybourn, 7 T. R. 3.

[1] Statements by director of corporation made en route from one place to another while not directly engaged in the business of the corporation held not admissible. Allington & Curtis Manufacturing Co. v. Detroit Reduction Co., 132 Mich. 427, 95 N. W. 562, 565. Statements of treasurer of corporation not evidence against it when made when he was not acting for it. Stanton v. Baird Lumber Co., 132 Ala. 635, 32 So. 299. Statements by local officers of Mutual Benefit Society admissible against society within the scope of agency. Patterson v. United Artisans, 43 Ore. 333, 72 Pac. 1095; Turnpike Co. v. Thorp, 13 Conn. 173; Bank v. Hart, 3 Day (Conn.), 491.

[2] Bank v. Davies, 6 W. & S. (Penn.) 285; Pemigewassett Bank v. Rogers, 18 N. H. 255.

his being an officer of the corporation is shown.[3] But admissions

[3] Law v. Conn., etc., R. R. Co., 45 N. H. 370; 46 id. 284; Robinson v. Lane, 19 Ga. 337.

[4] Sewanee Mining Co. v. McMahon, 1 Head. (Tenn.) 582; Chicago, etc., R. R. Co. v. Coleman, 18 Ill. 297; Franklin Bank v. Cooper, 36 Me. 180.

Where a demand was made upon the secretary of a railroad company for an original or certified copy of a subscription paper, proved to have been in possession of the company, it was held that, the presumption being that he was the custodian of such papers, his answer that it was lost was admissible as competent evidence of this fact against his employer. Indianapolis, etc., R. R. Co. v. Jewett, 16 Ind. 273. But where the cashier, upon inquiry made by a surety on a note in the bank, the day after its maturity, informed that it had been paid, and the surety consequently relinquished property which he held for his indemnity, such answer of the cashier was held not admissible in evidence, as not within the scope of his authority or duty. Bank v. Steward, 37 Me. 519.

In a Massachusetts case the defendant gave his bond to the plaintiff for a certain sum, in consideration of the assignment of a patent, the plaintiff representing that a certain company had purchased the right to use it, and were to pay a certain sum therefor, and that its validity had been established in a court of law in a certain place. It was held in an action upon a promissory note, given in exchange for the bond, that it was not competent for the defendant to give in evidence the declarations of the officers of the company when refusing to pay the sum represented to be due from them, as to the reasons for such refusal; nor to prove that the plaintiff had ascertained by inquiry the untruth of his statement that the validity of the patent had been established in a court of law. McMahon v. Tyng, 14 Allen (Mass.), 167.

In a New Hampshire case H. applied to the cashier of a bank for delay of payment of a note he had given the bank, and his proposition, in writing, was submitted to the directors. The cashier informed H. that his proposal was accepted, and the delay was given. It was held that the declarations of the cashier to H. were not evidence of what the terms of the contract were. Bank of Gratton v. Woodward, 5 N. H. 301. In an action by a corporation to recover damages for the conversion of property conveyed to it by P. and B., its officers and principal stockholders, and taken by the defendant on execution against P. and B., the issue was as to the good faith of the transfer to the corporation. It was held that evidence was admissible as to the acts and declarations of P. and B., tending to show that they were using the property after the transfer as if it were their own. Persse, etc., Paper Works v. Willett, 1 Robt. (N. Y.) 131. The declarations of a person made while obtaining the promissory note of another, to be used as a part of his contribution towards the capital stock of an insurance company, are not admissible against the company, unless it is shown that the person so obtaining the note was the agent of the company. Holbrook v. Wilson, 4 Bosw. (N. Y.) 64. A statement made to a bank officer by a person applying at a bank for the discount of a note, of the intended use of the money, and by that officer communicated to the directors, may be evidence to affect the bank with notice of such use; but is not evidence from which a jury would be authorized to find an agreement between that person and the bank, that the money should be used in that way. Merchants' Bank v. Spalding, 9 N. Y. 57. Proof of an admission by the secretary of an insurance company, made the morning after a loss had occurred, that the property destroyed was insured at the time of the fire, is not competent as principal evidence, being the declaration of a third person, who, though an agent of the defendant, was not then engaged in the performance of any act relating to his agency, so as to bring

or statements made by a corporate officer within the line of his authority, or in execution of his authority as such, are admissible.[4]

the case within the rule which allows the declaration of an agent as part of the *res gestae*. Neither is such evidence competent, for the purpose of disproving the agent's denial of the alleged admission. First Baptist Church v. Brooklyn, etc., Ins. Co., 28 N. Y. 153.

A foreman of a corporation which has ceased business cannot bind the stockholders personally by his settlement made with the operatives, and therefore evidence of such settlement is inadmissible, in a suit against them to recover for services rendered to the corporation. Strong v. Wheaton, 38 Barb. (N. Y.) 616. The declarations of the cashier of a bank, of his knowledge that certain stock which stood upon the books of the bank in the name of a certain individual was a trust fund invested for the benefit of others, may be given in evidence under certain circumstances, to charge the bank with knowledge of the fact. Harrisburgh Bank v. Tyler, 3 W. & S. (Penn.) 373. The president of a railroad company sufficiently represents his corporation to make his admissions evidence against the company. Charleston, etc., R. R. Co. v. Blake, 12 Rich. (S. C.) 634. So a declaration of the engineer just before or after an accident by running over a cow that "his engine should make her time or he'd blow her to hell," is admissible. Railroad Co. v. Messino, 1 Sneed (Tenn.), 220. But evidence of the statements of an engineer of a railroad corporation, as to matter in relation to which he is not shown to be their agent in some way, is inadmissible. Baltimore & Ohio R. R. Co. v. Gallahue, 12 Gratt. (Va.) 655.

Where a passenger applied to the agent of a railroad company for a ticket, who gave him a certificate that the tickets "were all out," which he showed to the conductor, the testimony of the agent is competent to show that the passenger applied for a ticket and the certificate to show that the conductor knew that the fault of the passenger's not having a ticket, lay with the company and not with the passenger. St. Louis, etc., R. R. Co. v. Dally, 19 Ill. 353. Officers of a municipal corporation can only bind the corporation by admissions relating to matters which come within the scope of their official duty. Thus where notice of a certain claim upon a town or city is required to be given to a certain officer, his admission that such notice has been given is clearly admissible, but his admission that the claim is a valid one is not admissible. Folsom v. Underhill, 36 Vt. 580. Nor can his admission be used as to a matter which legally should be submitted to the voters of the town or city, Morrell v. Dixfield, 30 Me. 157, nor to defeat the title of the corporation to lands. Walker v. Dunspaugh, 20 N. Y. 170.

CHAPTER XVII.

JUDICIAL NOTICE.

SECTION 174. In general.
175. Public and private statutes.
176. Currency, customs, history, political and governmental matters.
177. Matters of common knowledge.
178. Statutes and common law of other states.
179. As to judicial records.
180. Miscellaneous matters.
181. Pleading of statutes relied on.

Sec. 174. In General.

There are certain matters of which courts will take judicial notice, without putting parties to the trouble and expense of proving them. But these matters are comparatively few, and no precise rules can be given relative thereto. The courts in this country are much more liberal in this respect than the courts of England, but in this country even, the courts do not overstep the ordinary limits of common sense and sound discretion in the exercise of this power; but there are matters so fixed, so certain, so notorious, so essentially a part of the ordinary and usual experience of mankind, that to require proof in reference to their existence or operations would be over nice, and productive of useless expense and hardship upon parties.

In the ascertainment of any facts of which they are bound to take notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the foreign office or the Department of State.[1] The failure or refusal of the trial court to take judicial notice does not prevent the appel-

[1] Jones v. United States, 137 U. S. 202, 216, 11 S. Ct. 80. To same effect see Rogers v. Cady, 104 Cal. 288, 38 P. 81, 43 Am. St. Rep. 100.

late court from taking such notice.[2] The State legislature may enact that the courts may take judicial notice of a certain statute.[3]

Sec. 175. Public and Private Statutes.

Our courts will take judicial notice, without proof, of all *public* acts of the State; but private acts, or acts that are confined in their operation to a few persons, and have no general application or effect, must, if relied upon, be set forth in the pleadings, and proved upon trial, the same as any other fact.[1]

Acts which affect public rights, as acts giving authority to individuals or corporations to make erections or improvements in public navigable streams which affect the rights of navigation, fishery, or any common public right, will be regarded as public acts, although not specially made so in the act itself, and although its benefits or advantages are confined to a few persons.[2]

It would seem, however, that this rule must be restricted to cases where public rights are measurably affected, and where, except for the "act," the acts done in pursuance of it would be a *public nuisance;* that is, it must be such an invasion of public and common rights as to put every person upon inquiry as to the legality or otherwise of the act. In order to make an "act" a "public act" within the rule, it is not necessary that it should be applicable equally to the whole State; but any act which, although confined to a particular district, or part of the State, even though confined to a single township, or part of a township, if it applies equally to such district, part of the State or township, is a "public act," of which courts will take judicial notice without proof. So a certain statute authorizing condemnation of property in which the State is interested was held so far public that the court must take judicial notice of it.[3] And the court took judicial notice of a stock statute applying only to a certain county in the State, though local in nature, as it extends to all persons who may come within the territory described.[4] The court will

[2] Rogers v. Cady, 104 Cal. 288, 38 P. 81, 43 Am. St. Rep. 100. See, also, Hunter v. New York, etc., R. R. Co., 116 N. Y. 615.

[3] Case v. Kelly, 133 U. S. 21, 27, 10 S. Ct. 216. (Act incorporating a railroad.)

[1] Bowie v. City of Kansas, 51 Mo. 454; Covington Draw Bridge Co. v. Shepard, 20 How. (U. S.) 227.

[2] Hammond v. Inloes, 4 Md. 138.

[3] Chesapeake & O. Canal Co. v. Western Maryland R. Co., 99 Md. 570, 58 A. 34.

[4] Davis v. State (Ala., 1904), 37 So. 454.

take judicial notice of the date when a public law went into effect under proclamation of the governor, and of the dates of the terms of the State courts.[5] The passage of a public statute during the pendency of a suit will be judicially noticed without a formal supplemental plea.[6]

[5] Moss v. Sugar Ridge Tip, 161 Ind. 417, 68 N. E. R. 896.

[6] Vance v. Rankin, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173.

Thus it has been held that a special act of the legislature, extending the power of a single public officer, as an act extending the jurisdiction of a certain town constable throughout the county or State, is such an act as courts are bound to notice without proof. Bixler v. Parker, 3 Bush (Ky.), 166; Levy v. State, 6 Ind. 281. So of an act under which a person claims the office of a judge of a particular court. Clark v. Com., 29 Penn. St. 129. So of an act for the protection of fish in a certain river. Burnham v. Webster, 5 Mass. 266. So of an act providing for the survey of certain lands in a particular county, and providing that no sales of any portion of such lands should be made unless surveyed and marked. Pierce v. Kimball, 9 Me. 54. But *contra*, see Allegheny v. Nelson, 25 Penn. St. 332. So where an act, otherwise private and local, contains provisions that are public and general, the act, although partly local and partly public, will be deemed a public act, which need not be pleaded or proved. People v. McCann, 16 N. Y. 61; Williams v. People, 24 id. 407. Thus an act authorizing a municipal corporation to raise money by tax, which also contained a clause that restricted or changed the jurisdiction of the courts in reference to actions in which such corporation was a party, was held to be a public statute, of which the court would take judicial notice. Bretz v. The Mayor of N. Y., 6 Rob. (N. Y.) 330.

"Though it be true," says BULLER, J., (Kirk v. Norvill, 1 T. R. 125), "that an act of Parliament relating to trade in general is a public act, yet a statute which relates only to a certain trade is a private one." But in another case, King v. Briggs, Skin. 428, the court defined the distinction between an act partly private and partly public, in this way: "Although an act concern a particular thing, and therefore is private in its nature, yet if a forfeiture be given to the king by it, this makes it a public act."

So in a later case, Samuel v. Evans, 2 T. R. 569, the court held that, independent of the statute of Anne, an act providing that the sheriff might assign the bail bond was a public statute, of which the court would take notice without its being either pleaded or proved.

In an early English case, Holland's Case, 4 Coke, 79, the learned reporter defined the distinction between public statutes and private statutes thus: "The rule of the law is, that of general statutes the court ought to take notice, although they be not pleaded; otherwise of special or particular statutes; therefore, for the better understanding of your books in this point, and which shall be said in judgment of law, *statutum generale*, and which is *statutum speciale*, it is to be known that '*generale dicitur a genere, etc., speciale a specie;* and there are *genus, species et individua*. Spirituality is *genus;* bishopric, deanery, etc., are *species*, and bishopric, or deanery of Norwich is individual. Therefore, it was resolved in this case that, forasmuch as the act of 21 Henry 8 concerns the whole spirituality in general, it was a general act, of which the judges ought to take notice." In Claypool v. Carter, Pash. 31, it was held that an act of Parliament relating to Eton and Winchester colleges was a particular act, of which the judge should not take notice. So in Elmer v. Gate, 2 Roll. 466, that the statute of 30 Eliz., relating to leases made by

It will often be found difficult to determine precisely what statutes are, and what are not "public statutes" when the statute only applies to a municipal corporation, or a certain district of the State. But the real test applied by the courts, and the real guide seems to be, that an act which applies equally to all persons within the district designated, or to all persons doing or omitting to do a particular act, is a public statute within the rule.

Thus it will be seen that, although an act may affect very many persons, yet, if it is not equal and general in its application to all, in the State or locality to which it relates, it is a private act, which must be pleaded and proved; but, if it is general in its effect, and applies equally to all within the locality to which it relates, it is a public act, of which the courts will take judicial notice. This is the modern rule, which varies essentially from the doctrine advanced in some of the reports. Yet, whenever a purely private act provides in certain events a forfeiture to the government, or, in the case of a corporation, that the government in a certain contingency may take the property, it is deemed a public act.[7] And indeed all acts which in any wise concern the government, or any of its co-ordinate branches, may be said to be public.[8] So all acts in amendment of acts declared public by the terms of the original act.[9] So acts authorizing all corporations of a particular class to do certain acts, as all the railroads of the State to subscribe for the stock of other roads.[10] Or indeed any statutes, providing penalties or remedies affecting all persons who may offend against them, when all persons may come within their purview, are regarded as public.[11]

Charters of municipal corporations are public acts, whether so declared in the act creating them or not, and need not be alleged in the pleadings, or proved on the trial, in actions where the provisions of such charters become material.[12] And the same is

bishops, was a special act, because it concerned bishops only, who are but *species* of spirituality.

[7] Jenkins v. Union Turnpike Co., 1 Caines' Cas. (N. Y.) 86.

[8] Dwarris on Statutes, vol. 2, p. 464.

[9] Bank of Utica v. Smedes, 3 Cow. (N. Y.) 684.

[10] White v. Syracuse & Utica R. R. Co., 14 Barb. (N. Y.) 559.

[11] Pierce v. Kimball, 9 Me. 54; Hendee v. Ayres, 12 Pick. (Mass.) 344.

[12] State v. Sherman, 42 Mo. 210; Griffing v. Gibb, 2 Black (U. S.), 519; Alexander v. Milwaukee, 14 Wis. 247; Brell v. McDonald, 7 Kan. 426; Case v. Mobile, 30 Ala. 538; Terry v. Milwaukee, 15 Wis. 490; Janesville v. Milwaukee, etc., R. R. Co., 7 id. 484; Swaine v. Comstock,

true as to all amendments thereto.[13] But when municipal corporations are formed under a general law, their organization and all the legal steps requisite to perfect their organization must be proved. So, where, by the terms of the charter, the question of acceptance is submitted to the people, its acceptance by them must be duly alleged and proved.[14] By-laws of a municipal corporation are private acts and will not be judicially noticed.[15] So of municipal ordinances, which must be attested by the city clerk to be admissible,[16] although it has been held that a municipal court may take judicial notice of the ordinances of its municipality, and so may a superior court on appeal from a municipal court.[17] The charter of a city is a public act of which the courts take judicial notice,[18] as well as of its territorial limits,[19] and of the incorporation of municipalities by special acts of the legislature and of the territory included, because these matters are disclosed by the enactments themselves, but they will not take notice of the width of streets not mentioned in the charter.[20] A State court will take judicial notice of the adoption of township organization by any county in the State.[21] Charters of private corporations are private acts, unless made public by the terms of the act creating them, and must be proved.[22] In Kentucky, courts are now

18 id. 463; Smith v. Flourney, 47 Ala. 345; Letier v. Oskaloosa, 41 Iowa, 353; Bretz v. Mayor of N. Y., 6 Rob. (N. Y.) 325; Fauntleroy v. Hannibal, 1 Dill. (U. S.) 118; Hawthorne v. Hoboken, 3 Vroom (N. J.), 72; Payne v. Treadwell, 16 Cal. 220.

[13] Hawthorne v. Hoboken, *ante;* Terry v. Milwaukee, *ante.*

[14] Johnson v. Common Council, 16 Ind. 227.

[15] Tucker v. Com., 4 Bush (Ky.), 40; Mooney v. Kennett, 19 Mo. 551; Cox v. St. Louis, 11 id. 431; Garvin v. Wells, 8 Clarke (Iowa), 286; Barker v. Mayor of N. Y., 17 Wend. (N. Y.) 464.

[16] O'Brien v. Woburn, 184 Mass. 598, 69 N. E. R. 350.

[17] Portland v. Yick, 44 Or. 439, 75 Pac. 706. See, also, State v. Sieber, 11 Iowa, 407. In a municipal court the city ordinances will be judicially noticed. Relatively to the municipal court, an ordinance of the municipality stands upon the same footing as do public acts of the Legislature in the courts of the State. They are the laws of the forum—the enactments of the legislative department of the government of which the municipal court is the judicial branch. Taylor v. City of Sandersville, 118 Ga. 63, 44 S. E. 845. The court will take judicial notice of the organization of a city, so it is not necessary to prove such organization before putting in evidence its municipal ordinances. Jackson v. Kansas City, etc., R. R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650.

[18] Arndt v. City of Cullman, 132 Ala. 540, 31 So. 478.

[19] Ex Parte Wygant, 39 Ore. 419, 64 P. 867, 87 Am. St. Rep. 673.

[20] Coe College v. City of Cedar Rapids, 120 Iowa, 541, 95 N. W. 267.

[21] Phillips v. Town of Scales Mound, 195 Ill. 353, 63 N. E. R. 180.

[22] Drake v. Flewellon, 33 Ala. 674; Tucker v. Com., 8 Bush (Ky.), 440; Perdicaris v. Trenton, etc., 29 N. J. L. 367; Butler v. Robinson, 75 Mo. 192.

by statute required to take judicial notice of all laws, public or private.[23] But otherwise of charters of banks authorized to issue notes.[24]

Sec. 176. Currency, Customs, History, Political and Governmental Matters.

Courts will not take judicial notice of the value of bank notes, although used as currency, nor of the depreciation of the national currency.[1] But courts will take judicial notice of the *kind* of currency in use, and that gold and silver coin is no longer used as such, but has become an article of traffic and merchandise,[2] and that contracts made at a particular time are made in reference to the particular currency then in use;[3] also of the genuineness and value of American coin, as dimes, eagles, etc.; and in a case where in an indictment the respondent was charged with the larceny of a gold coin called an American eagle without stating its value, this was held sufficient.[4] But the value of foreign coin or currency must be proved, unless its value has been fixed by congress.[5]

Courts will not take judicial notice of *local* customs, or the meaning of devices used in a particular trade, and the same, if relied upon, must be proved;[6] but they will judicially notice a general custom of merchants throughout the State,[7] or one so universal and general that persons are presumed to know of it;[8] and of the law merchant;[9] and of commercial usage as to days *dies*

[23] Collier v. Baptist, etc., Soc., 48 B. Monr. (Ky.) 68.

[24] Buell v. Warner, 33 Vt. 570; Davis v. Bank of Fulton, 31 Ga. 59; Bank of Newberry v. Gr. C. R. R. Co., 9 Rich. (S. C.) 495; Shaw v. State, 3 Sneed (Tenn.), 86; State Bank v. Watkins, 1 Eng. (Ark.) 123.

[1] Feemster v. Ringo, 5 Monr. (Ky.) 336; Madawell v. Holmes, 40 Ala. 391; but see State Bank v. Watkins, 1 Eng. (Ark.) 123, *contra*.

[2] U. S. v. American Gold Coin, 1 Woolw. (U. S.) 217; Lampton v. Hazzard, 3 Monr. (Ky.) 149; Janes v. Overstreet, 4 id. 547.

[3] Buford v. Tucker, 44 Ala. 89.

[4] Daily v. State, 10 Ind. 536; U. S. v. Burns, 5 McLean (U. S.), 23; U. S. v. King, 5 id. 208.

[5] Kermott v. Ayer, 11 Mich. 181; McButt v. Hoge, 2 Hilt. (N. Y. C. P.) 81.

[6] Johnson v. Robertson, 31 Md. 416; Wheeler v. Webster, 1 E. D. Smith (N. Y.), 1; Harsh v. North, 40 Penn. St. 241; Humphreysville, etc., Co. v. Vt., etc., Co., 33 Vt. 92; Turner v. Fish, 28 Miss. 306; Sullivan v. Heuse, 2 Col. 424.

[7] Smith v. Miller, 43 N. Y. 171; Bronson v. Windsor, 8 id. 182.

[8] McKinnon v. Bliss, 21 N. Y. 206; Munn v. Burch, 25 Ill. 35; Gregory v. Baugh, 4 Rand. (Va.) 611.

[9] Jewell v. Centre, 25 Ala. 498.

non, as Sundays and Christmas.[10] So a universal custom to recognize the rights of a prior appropriator of water for mining and other beneficial uses in a certain district may be judicially recognized by the courts,[11] as also well known customs and usages governing the creation and existence of all organized political parties in the country.[12] The court will take judicial notice of a well known custom of banks and so of the fact that a bank when it makes a collection from foreign correspondents never remits the specie collected but always sends therefor its draft or certificate of deposit.[13]

Courts will not generally take notice of historical facts,[14] except matters of public history affecting the whole State or people.[15] A state court will take judicial knowledge of such essential historic facts as have exercised influence on the Commonwealth and also of any matters of public history affecting the whole public, and so they will take notice of the cession of a portion of the territory of the state to a foreign jurisdiction.[16] So the courts will take judicial notice that under the treaty of Paris, between the United States and Spain, the Philippine Islands became a part of the territory of the United States, and that after that time the inhabitants of those islands were in a state of insurrection against our government, as the insurrection was recognized in a proclamation of the president. The existence of war is a political question and courts take notice without proof of the acts of the different political departments of the government.[17] The court may take notice of the order of the governor to the militia and his proclamation to avert rioting, as a matter of history.[18] So of the existence of civil war in the country,[19]

[10] Sassur v. Farmers' Bank, 4 Md. 409.

[11] Isaacs v. Barber, 10 Wash. 124, 38 P. 871, 45 Am. St. Rep. 772; Crawford Co. v. Hathaway (Neb., 1903), 93 N. W. 781, 794.

[12] State v. Metcalf (S. D., 1904), 100 N. W. 923.

[13] Bowman v. First National Bank, 9 Wash. 614, 38 P. 211, 43 Am. St. Rep. 870.

[14] McKinnon v. Bliss, 21 N. Y. 206; Gregory v. Baugh, 4 Rand. (Va.) 611.

[15] Simonton v. Columbian Ins. Co., 37 N. Y. 174; Payne v. Treadwell, 16 Cal. 220; Rice v. Shook, 27 Ark. 137; Killebreur v. Murphy, 3 Heisk. (Tenn.) 346; Cuyler v. Terrill, 1 Abb. (U. S.) 169; Stokes v. Macken, 62 Barb. (N. Y.) 145; Wood v. Wilder, 43 N. Y. 164; Ferdinand v. State, 39 Ala. 706.

[16] Lasher v. State, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922; People v. Snyder, 41 N. Y. 397.

[17] La Rue v. Kansas Mut. Life Ins. Co., 68 Kan. 539, 75 Pac. 494.

[18] Bosworth v. Union R. Co., 25 R. I. 202, 58 A. 982.

[19] Swinnerton v. Columbia Ins. Co., *ante.*

or of the separation of churches of the same denomination, as the separation of the Methodist church into two national bodies under the name of the Methodist Church North, and Methodist Church South;[20] or that a certain college is a national institution;[21] of the division of a State into towns;[22] of the political and social condition of the people of the country over which their jurisdiction extends;[23] of who, from time to time, presides over the patent office, or other executive or judicial department of the government, even though for a temporary, rather than a permanent purpose.[24] The courts will take judicial notice of the rites of the Mormon church and of works of history and church records on the subject and by their means ascertain the meaning of a certain form of marriage called "sealing."[25] The courts will also take notice of the fact that Maryland embraces a part of the territory of the original English colonies of America, and, in the absence of evidence to the contrary, it will be presumed that the common law obtains there.[26] As to the history of a country; the places where courts are, or formerly have been, held therein, and as to the times when said courts were held, and when the change in the place or time of the holding of courts was made.[27] And that it has adopted townships, and when.[28] Of who are public officers of the State, executive or judicial,[29] and of any changes therein;[30] the time when their term of office commenced, and when it ended; also of the genuineness of their signatures.[31] As who is governor,[32] and of appointments made by him under the constitution and laws;[33] of who are judges of subordinate courts;[34] of orders issued by com-

[20] Humphrey v. Burnside, 4 Bush (Ky.), 215.

[21] Oxford Rate, 8 E. & B. 184.

[22] State v. Powers, 25 Conn. 48; King v. Kent, 29 Ala. 542.

[23] Irwin v. Phillips, 5 Cal. 140.

[24] York & Maryland Line R. R. Co. v. Winans, 17 How. (U. S.) 30.

[25] Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660.

[26] N. Frank & Sons v. Gump. (Va., 1905), 51 S. E. 358.

[27] Robertson v. Teal, 9 Tex. 344; Ross v. Austell, 2 Cal. 183.

[28] Rock Island v. Steele, 31 Ill. 543.

[29] The courts are bound to take judicial notice of who are the public officers of the state holding under commissions issued by the governor and so in Georgia of the ordinaries of the several counties of the state. Bailey v. McAlpin, (Ga., 1905), 50 S. E. 388.

[30] The court will take judicial notice that a former state treasurer and former state attorney-general ceased to hold office on a certain date, their successors having been elected and inducted into office. State v. Board of Canvassers, (Mont., 1905), 79 Pac. 402.

[31] People v. Johr, 22 Mich. 461; Heizer v. State, 12 Md. 330.

[32] Wells v. Jackson, etc., Co., 47 N. H. 235.

[33] State v. Evans, 8 Humph. (Tenn.) 110.

[34] Kilpatrick v. Com., 31 Penn. 198.

petent military authority;[35] of who are justices of the peace in the county where the court is held, and of the genuineness of their signatures;[36] who are elected sheriffs, time when their term of office commences, and when it ends, and of the genuineness of their signatures;[37] but not who are deputy officers, sheriffs or otherwise.[38] Who are the officers of the court, and, in a case where the word "clerk" was omitted from the *jurat* of an affidavit, it was held sufficient, as the court was bound to know who was clerk, and whether his signature was genuine.[39] But not who are officers of other courts.[40] That a certain person is an attorney.[41] And of the genuineness of his signature connected with professional acts done by him, but not in cases in which he is himself a party.[42] Also of what attorneys have appeared in a cause.[43] Who are executive and judicial officers of the United States, elected or appointed in pursuance of the constitution or laws of congress.[44] Who are registrars of a county.[45]

Where a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the courts will take judicial notice of them.[46]

The courts will take judicial notice of the rules and regulations of the executive government and so of the regulations of the secretary of the interior.[47]

[35] New Orleans v. Templeton, 20 La. Ann. 141; Lanfier v. Mester, 18 id. 497; Taylor v. Graham, id. 656.

[36] Graham v. Anderson, 42 Ill. 514; Chambers v. People, 4 Scamm. (Ill.) 351.

[37] The appointment or retirement of a sheriff will be recognized without proof, on account of the importance of the office. State v. Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534; Rayland v. Wynn's Adm., 37 Ala. 32; Alexander v. Burnham, 18 Wis. 199; Wetherbee v. Dunn, 32 Cal. 106; Dyer v. Flint, 21 Ill. 80; Ingraham v. State, 27 Ala. 17.

[38] Ward v. Henry, 19 Wis. 76; Joyce v. Joyce, 5 Cal. 449; State Bank v. Curran, 5 Eng. (Ark.) 142; Lund v. Patterson, Minor (Ala.) 14.

[39] Mayor v. State, 2 Sneed (Tenn.) 11; Dyer v. Loat, 57 Ill. 179; Thompson v. Haskell, 21 id. 215; Bishop v. State, 30 Ala. 34.

[40] Norwell v. McHenry, 1 Mann. (Mich.) 227.

[41] People v. Nevins, 1 Hill (N. Y.), 154.

[42] Masterson v. Le Clare, 4 Minn. 163.

[43] Symmes v. Mayor, 21 Ind. 443.

[44] York & Md. Line R. R. Co. v. Winans, 17 How. (U. S.) 30.

[45] Fancher v. De Montegre, 1 Head. (Tenn.) 40.

[46] Larson v. First Nat. Bank, (Neb., 1902), 92 N. W. 729.

[47] Zevely v. Weimer, (Indian Territory), 82 S. W. 941, 949.

"Wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial no-

Of general elections,[48] but not of elections in other States except where it is fixed by act of congress.[49] And who are elected to fill certain offices, when their term begins, when it ends, and of all changes therein, whether by death, resignation or otherwise, and of the genuiness of their signature.[50]

Courts will take judicial notice of notarial certificates as proof of presentation and non-payment;[51] so of foreign treaties with our national government;[52] so of the charter of a railroad company printed with legislative documents by authority of the State;[53] so of what is meant by the words "Gift enterprise;"[54] of what constitutes the twentieth judicial day of the term of the court below;[55] of its own judgment in a suit which is virtually a part of the same record;[56] of the expiration of a bank charter.[57] The United States courts will take judicial notice that the United States for revenue purposes is divided into districts with certain geographical boundaries,[58] and also of the public statutes of the several States;[59] but State courts will not.[60] Courts will take judicial notice of the official acts of an alderman;[61] of the official signature of its clerk;[62] of the repeal of a section of an act incorporating a town;[63] of the

tice." So the court may take judicial notice of the rules of the Interior Department as to contests before the Land Office. Caha v. United States, 152 U. S. 211, 221, 14 S. Ct. 513.

[48] Rice v. Mead 22 How. Pr. (N. Y.) 445; Davis v. Best, 2 Clarke (Iowa), 96; State v. Minnick, 15 id. 123.

[49] Taylor v. Renne, 35 Barb. (N. Y.) 272; Dale v. Wilson, 16 Minn. 525.

[50] Alexander v. Burnham, 18 Wis. 199; Wells v. Jackson, 47 N. H. 235; *Ex parte* Peterson, 33 Ala. 74; State v. Williams, 5 Wis. 308; Heizer v. State, 12 Ind. 330; Ragland v. Winn, 1 Ala. 270; Templeton v. Morgan, 16 La. Ann. 438; Ragland v. Winn's Adm'r, 37 Ala. 32.

[51] Pierce v. Indseth, 106 U. S. 546. A county court may take judicial notice of who are the notaries public in the county. Hertig v. People, 159 Ill. 237, 42 N. E. 879, 50 Am. St. Rep. 162. The court will take judicial notice that the person whose name appears on a jurat to an affidavit was a notary public in and for the county named and it presumes that he acted within the county of his jurisdiction. Black v. Minneapolis & St. L. R. Co., 122 Iowa, 32, 96 N. W. 984.

[52] Lacroix v. Sarrazzin, 15 Fed. Rep. 489.

[53] Hall v. Brown, 58 N. H. 93. But see Timlow v. Philadelphia, etc., R. R. Co., 99 Penn. St. 284.

[54] Lehman v. State, 81 Ind. 15.

[55] Lewis v. Wintrode, 76 Ind. 13.

[56] Farrar v. Bates, 55 Tex. 193.

[57] Terry v. Merchants', etc., Bank, 66 Ga. 177.

[58] United States v. Jackson, 104 U. S. 41.

[59] Edward v. Flanagan, 104 U. S. 462.

[60] Robards v. Morley, 80 Ind. 185; Neese v. Farmers' Ins. Co., 55 Iowa, 604; Chapman v. Colby, 47 Mich. 16.

[61] Fox v. Com., 81 Penn. St. 511.

[62] Buell v. State, 72 Ind. 523. But see Russell v. Sargent, 7 Ill. App. 98, where it was held that an appellate court will not take judicial notice of what persons are judges of the Circuit Court.

[63] Belmont v. Morrill, 69 Me. 314.

suspension of a public statute.[64] State courts will not take judicial knowledge of bankruptcy proceedings;[65] but they will take notice of the chancery district in which a certain town in the State is situated;[66] of matters of public history, as of Fremont's public career in California in 1846 and '47;[67] of the existence of a *quasi* public corporation, as a railroad corporation;[68] of the history of the State and its topography and condition;[69] of the course of seasons and of husbandry;[70] of the course of business in the country and of new processes of practical utility in facilitating trade;[71] of the functions of town officers under the statute,[72] and of common epithets which are generally understood, as "Beecher business," applied to a clergyman.[73]

Of the resignation or coming in of public officers;[74] and of the duties imposed upon persons or officers by State or national law respecting particular matters.[75] Of the jurisdiction of courts of the State and of the United States, and of the acts giving it.[76] That the State and townships are political bodies.[77] Of constitutions of other States and powers thereby given to courts.[78] That public streets in cities are public highways.[79] That municipal corporations have the power to improve streets.[80] Of the navigability of the streams of the State.[81] But not as to what streams are *floatable*.[82] Of the facilities for public travel between different points, the great lines of public travel and their connections.[83] Also, of facts that are a part of the experience of the day, as the

[64] East Tenn. Iron Manuf. Co. v. Gaskell, 2 Lea (Tenn.), 242.

[65] Estabrook Steel Pen Manuf. Co. v. Ahern, 30 N. J. Eq. 341.

[66] Alabama, etc., Life Ins. Co. v. Cobb, 57 Ala. 547.

[67] De Celis v. United States, 13 Ct. of Cl. 117.

[68] Baltimore, etc., R. R. Co. v. Sherman, 30 Gratt. (Va.) 602.

[69] Wilson v. State, 54 Ind. 553.

[70] Ross v. Boswell, 60 Ind. 235; as when crops mature. Tomlinson v. Greenfield, 31 Ark. 557.

[71] Wiggin Ferry Co. v. Chicago, etc., R. R. Co., 5 Mo. App. 347.

[72] Ingles v. State, 61 Ind. 212.

[73] Bailey v. Kalamazoo Publishing Co., 40 Mich. 251.

[74] *Ex parte* Peterson, 33 Ala. 74; State v. Williams, 5 Wis. 308; Heizer v. State, 12 Ind 330.

[75] Semple v. Hagar, 27 Cal. 163.

[76] Meshke v. Van Daren, 16 Wis. 319; Bretz v. Mayor, etc., of N. Y., 6 Rob. (N. Y.) 326.

[77] Le Grange v. Chapman, 11 Mich. 499.

[78] Butcher v. Brownsville, 2 Kan. 70.

[79] Wittaker v. Eighth Av. R. R. Co., 5 Rob. (N. Y.) 650.

[80] Murray v. Titcomb, 19 Ind. 135.

[81] Neaderhauser v. State, 28 Ind. 257; Brown v. Scofield, 8 Barb. (N. Y.) 237.

[82] Adsit v. Allen, 42 N. Y. 378; Rhodes v. Otis, 38 Ala. 578.

[83] Manning v. Gasparie, 27 Ind. 399; Smith v. N. Y. Central R. R. Co., 43 Barb. (N. Y.) 225; Mayhee v. Camden & Amboy R. R. Co., 45 N. Y. 514; Hines v. Cochran, 13 Ind. 175.

usual length of time required for steam passage across the Atlantic.[84] Of the coincidence of the days of the week and month.[85] The court judicially knows by reference to the almanac on what day of the week a certain day of the month fell,[86] and when the sun rises and sets during different days;[87] the terms of court in the State, their commencement and close.[88]

The courts will take judicial cognizance of the political subdivision of the State, that a particular township is in a certain county and of the relative location of such towns in respect to each other. But the courts will not take judicial notice of the location of a certain lot in a subdivision of lots in a city made by a municipal officer and not by statute.[89] So the court will take judicial notice of the boundaries of counties and their area,[90] and the towns of which they are composed.[91] It will take judicial notice of the names of counties in which cities in the State are situated, but not of the names of streets and public places in the towns and cities of the State.[92] The court will take judicial notice of the

[84] Oppenheim v. Wolf, 3 Sandf. Ch. (N. Y.) 571; 49 N. Y. Legal Obs. 259.

[85] State v. Hammett, 2 Eng. (Ark.) 492; Sprowl v. Lawrence, 33 Ala. 106; Seeman v. Owen, 31 id. 167; Mechanics' Bank v. Gibson, 7 Wend. (N. Y.) 460; Davis v. Petticolas, 34 Lex. 27.

[86] Dorough v. Equitable Mortgage Co., 118 Ga. 178, 45 S. E. 22; Philadelphia, etc., R. R. Co. v. Lehman, 56 Md. 209; Reed v. Wilson, 41 N. J. L. 29; McIntosh v. Lee, 57 Iowa, 356; People v. Chee Kee, 61 Cal. 404. See also, State v. Hammett, 2 Eng. (Ark.) 492; Sprowl v. Lawrence, 33 Ala. 106; Mechanics' Bank v. Gibson, 7 Wend. (N. Y.) 460.

[87] People v. Chee Kee, 61 Cal. 404.

[88] Pugh v. State, 2 Head. (Tenn.) 227; Morgan v. State, 12 Ind. 448; McGinness v. State, 24 id. 500; Bethune v. Hale, 45 Ala. 522.

[89] Gunning v. People, 189 Ill. 165, 59 N. E. 494, 82 Am. St. Rep. 433, and note page 439. (Explaining Sever v. Lyons, 170 Ill. 395, 48 N. E. 926 by saying that the court in that case intended only to decide that the court would take judicial notice of the fact that the land was divided.)

[90] Zimmerman v. Brooks, (Ky.) 80 S. W. 443.

[91] Board of Commissioners v. Spittler, 13 Ind. 235; Kidder v. Blaisdell, 45 Me. 461.

[92] Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594. The court is bound to notice without proof the boundary line of the counties originally laid off in accordance with the governmental survey and also the effect of a statute creating a certain county and the court may take cognizance also of the fact that there has been no resurvey of the territory embraced in that county or any renumbering of the original land lots. Standford v. Bailey, (Ga., 1905), 50 S. E. 161. Where property in a pleading is clearly and distinctly described the county in which the land so described is situated is a matter within the judicial knowledge of the courts. For the purpose of informing itself the court might inquire of others, or refer to books or documents, or any other source of information which it might deem authentic, but this action in this respect is not a part of the trial of issues in the case. Rogers v. Cady, 104 Cal. 288, 38 P. 81, 43 Am. St. Rep. 100. While the court will

situation of land according to the government survey,[93] and of the fact that a certain county in the State lies on the west bank of a certain river,[94] and it may also take judicial notice of the boundaries of a city in a State as set forth in its acts of incorporation and also of the fact that a certain river flows in a certain direction through a certain part of the city.[95] So the court may make judicial cognizance of the source, course and mouth of a certain river in a State and that along a certain part of it the river affords a natural and free highway for the passage of fish.[96] And where in an indictment an offense is stated to have been committed in a certain town, without naming the county, it is sufficient, as the court will take judicial notice of the county in which the town is situated.[97] But in England the rule is otherwise.[98] Of what lands are held by the general government in the State;[99] of the boundaries of the State,[100] and of all agreements in reference thereto,[101] and of all changes therein;[102] and of counties;[103] and of municipal corporations, when the boundaries are defined in the act creating them;[104] but not where their boundary is purely a matter of municipal regulation, or of record under general laws.[105] So they will take judicial notice of the distance between the principal cities of the country, and of the time ordinarily required for railway trains to run to and from them;[106] but they will not take judicial notice of the distance of a certain mining location from the seat of government;[107] but they will judicially notice that

take judicial notice of the streets of a city in a state and their relation to each other and the direction in which they run, it will not take judicial notice whether a road or public highway outside of the corporate limits of the city is within five miles thereof. Stealey v. Kansas City, 179 Mo. 400, 78 S. W. 599.

[93] Ledbetter v. Borland, 128 Ala. 418, 29 So. 579.

[94] Bowling v. Mobile & M. R. Co., 128 Ala. 550, 29 So. 584.

[95] De Baker v. Southern California Ry. Co., 106 Cal. 257, 39 P. 610, 46 Am. St. Rep. 237.

[96] People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374, 58 Am. St. Rep. 183.

[97] Vanderwerker v. People, 5 Wend. (N. Y.) 530; State v. Reader, 60 Iowa, 527.

[98] Anonymous, 1 Chitty, 31; Rex v. Bourn, Burr. 42; Brune v. Thompson, 2 Ad. & El. 789.

[99] Lewis v. Harris, 31 Ala. 689.

[100] State v. Dunwall, 3 R. I. 480.

[101] Thomas v. Stigers, 5 Penn. St. 480.

[102] People v. Snyder, 41 N. Y. 397.

[103] Ross v. Reddick, 2 Ill. 73; State v. Tootle, 2 Harring. (Del.) 541; Goodwin v. Appleton, 21 Me. 453; Ham v. Ham, 39 Me. 263; State v. Jackson, id. 291.

[104] Griffing v. Gibb, 2 Black (U. S.), 519; City Council of Montgomery v. M. & W. Plank Road Co., 31 Ala. 79; Ham v. Ham, 39 Me. 263; Chapman v. Wilber, 6 Hill (N. Y.), 475; Bronson v. Gleason, 7 Barb. (N. Y.) 472.

[105] Brune v. Thompson, 2 Gale & D. 110.

[106] Pearce v. Langfit, 101 Penn. St. 507, 47 Am. Rep. 737.

[107] Russell v. Hoyt, 4 Mont. 412.

there are or are not tidal streams in the State, as the fact may be,[108] and which of them are or are not tidal streams. That a town in the State is in a certain county, and if such is the fact, that it is the county seat.[109] If it is provided in a public statute that cities shall be divided into wards, the courts of the State will take judicial notice that they are so divided; but where the statute merely provides that they *may* be divided into wards, courts will not presume that they have been so divided. Nor will the court presume that a locality having the requisite number of inhabitants to enable it to become a town under the provisions of a public statute, has availed itself of such provision.[110] Where an act is alleged in the pleadings to have been done in a certain town, the court will take judicial notice of the county in which such town is situated.[111]

The Supreme Court of Michigan has carried the doctrine of judicial notice to an extreme point and held that the court is bound to take judicial notice that a box freight car standing still at a railway crossing will not frighten horses of ordinary gentleness.[112]

The courts will take judicial notice of what States joined the Confederacy;[113] of the result of an election on the question of the removal of a county seat;[114] of the different classes of notes and bills in circulation as money, at a particular time;[115] of the disturbed condition of business in war times;[116] of the issue and depreciation of Confederate money;[117] that trains run on a railroad

[108] Walker v. Allen, 72 Ala. 456.

[109] Carson v. Dalton, 59 Tex. 500.

[110] Hopkins v. Kansas, etc., R. R. Co., 79 Mo. 98; Temple v. State, 15 Tex. App. 304; 49 Am. Rep. 200.

[111] State v. Reader, 60 Iowa, 527; *contra*, Clayton v. May, 67 Ga. 769. See also Hoffman v. State, 12 Tex. App. 406; Boston v. State, 5 Tex. App. 383.

[112] Gilbert v. Flint, etc., R. R. Co., 51 Mich. 488; 47 Am. Rep. 592.

This case seems to trench sharply upon the province of the jury, and if its doctrine is adopted, there would seem to be little use for juries in the class of cases to which it applies. Again, in our judgment, the doctrine is not sustained by human experience; it certainly is not by my own, and seems not to have been in the case before the court. Horses are intelligent animals. When they approach a railroad track they know that there is danger to them there, and if they have ever seen a train of cars, they understand that it is moved by some dangerous agency, and when they see a car standing on a track near a crossing, they seem to expect that this dangerous agency is there also, and they indicate this belief by their conduct. I feel sure that there are very few people accustomed to the use of spirited, but perfectly gentle horses, whose experience would sustain the court.

[113] Dauthitt v. Stinson, 63 Mo. 268.

[114] Andrews v. Knox County, 70 Ill. 65.

[115] Hart v. State, 55 Ind. 599; Lumpkin v. Murrell, 46 Tex. 51.

[116] Foscue v. Lyon, 55 Ala. 440.

[117] Simmons v. Trumbo, 9 W. Va. 358.

are run and controlled by the owners of the road;[118] of authority given to a county to subscribe for railroad stock;[119] of public acts regulating the speed of railroad trains;[120] of the constitution of another State, so far as the jurisdiction of its courts depends thereon.[121] So courts will take judicial notice of the manner in which Confederate money was forced upon the people of the States under the Confederate government;[122] when the Rebellion was terminated;[123] of previous financial depressions;[124] of the commencement and duration of the terms of the circuit court,[125] and of previous proceedings before it in a case on trial,[126] but not of proceedings before it in some other case,[127] nor of the rules of a lower court;[128] but they will take notice of the different terms of a lower court of a county or district,[129] and of their duration.[130] Courts will not take judicial notice of the charter of a savings bank,[131] nor of a railroad company,[132] unless they are in terms made public acts. A court will take judicial notice of the accuracy and genuineness of its own record.[133] A State court will not take judicial notice of proceedings in a federal court,[134] nor that any person is an officer, unless he is elected or appointed under some public statute;[135] but it will take judicial notice of government surveys of land, and also of blocks and lots in towns and cities.[136] So that the termini of a turnpike road laid out under a statute so requiring are within a certain county, and that a road running from one terminus of such turnpike to the other is also within the county.[137] So courts will take judicial notice of the source of the title to all lands within its jurisdiction, where they were all derived from the same source.[138]

In Indiana it is held that the courts will take judicial notice

[118] South, etc., R. R. Co. v. Pilgreen, 62 Ala. 305; Evansville, etc., R. R. Co. v. Smith, 65 Ind. 92.
[119] Smith v. Tallapoosa Co., 2 Woods (U. S. C. C.), 574.
[120] Harn v. Chicago, etc., R. R. Co., 38 Wis. 463.
[121] Dodge v. Coffin, 15 Kan. 277.
[122] Keppel v. Petersburg R. R. Co., Chase's Dec. (U. S. C. C.) 167.
[123] Turner v. Patton, 49 Ala. 406.
[124] Ashley v. Martin, 50 Ala. 537.
[125] Rodgers v. State, 50 Ala. 102.
[126] State v. Bowen, 16 Kan. 475; Bank v. Bryant, 13 Bush (Ky.), 419.
[127] Banks v. Burnham, 61 Mo. 76.
[128] Cutler v. Caruthers, 48 Cal. 178.
[129] Dorman v. State, 56 Ind. 454.
[130] Spencer v. Curtis, 57 Ind. 221.
[131] Mandere v. Bonsignore, 28 La. An. 415.
[132] Perry v. New Orleans R. R. Co., 55 Ala. 413.
[133] Robinson v. Brown, 82 Ill. 279.
[134] Haber v. Klauberg, 3 Mo. App. 312.
[135] Alford v. State, 8 Tex. App. 546.
[136] Gardner v. Eberhart, 82 Ill. 316.
[137] Steinmetz v. Versailles, etc., T. Co., 57 Ind. 457.
[138] Smith v. Stevens, 82 Ill. 554.

that during and since the civil war the adjutant-general has made records of the muster-rolls of the regiments furnished the United States, and a duly certified copy of such a roll is competent evidence of the enlistment, etc., of a volunteer, in an action by him to recover a bounty; and such copy is competent, although the adjutant-general certifying it is no longer in office.[139]

Evidence in the record that a town has assumed to act as a village corporation, in the passage of ordinances, and the bringing of suit in its corporate village name, and that an offense had been charged as committed within the corporate limits of the "village of" A., was held sufficient to warrant the court in taking judicial notice of the change by said town from its original organization to that under the general law, without proof that all the requirements of the statute had been complied with.[140]

The court will take judicial notice of the population of a county by the United States census.[141] The court in ascertaining the population of a county at a certain date will take judicial notice only of the last official census and cannot recognize, although morally certain of, increase since that date.[142] The Supreme Court will take judicial notice of the population of a county according to the last census, in determining in which class it is placed by the constitution, in order to regulate the fees of the clerks of the Circuit Court.[143]

Where a public act expressly recognizes and amends a private act, courts will take judicial notice of the existence and duties of an office provided in the latter.[144]

Judicial notice is taken of the custom of mutual credits under which business houses furnish each other's clerks, or customers, with goods, and charge them to each other.[145]

Courts do not take judicial knowledge of the local customs which, under the United States statute, entitle prior possessors to a right to use water for mining purposes, etc.; the claimant must allege and prove the custom.[146]

[139] Monroe County Comm'rs v. May, 67 Ind. 562.

[140] Doyle v. Bradford, 90 Ill. 416.

[141] Board of Com'rs v. Garty, 161 Ind. 464, 68 N. E. R. 1012.

[142] Adams v. Elwood, 176 N. Y. 106. 68 N. E. R. 126.

[143] Worcester Bank v. Cheney, 94 Ill. 430.

[144] Lavalle v. People, 6 Ill. App. 157.

[145] Cameron v. Blackman, 39 Mich. 108.

[146] Lewis v. McClure, 8 Or. 273.

Sec. 177. Matters of Common Knowledge.

Courts will take judicial notice of all matters that are a part of the experience and common knowledge of the day;[1] as that certain provinces are in a foreign country, and that they have governments and courts, and that their courts proceed according to the usual course of the common law;[2] but not when the government has not recognized such foreign province;[3] but it will take judicial notice of the existence of such province, whether it has been recognized by the government under whose jurisdiction it acts or not.[4] So of wars in which this government is engaged, whether domestic or foreign;[5] but not of wars in which foreign countries are engaged;[6] nor of articles of war unless published under authority of the government;[7] of the political divisions of the country and the location of States;[8] where the principal rivers of the State lie, what sections they traverse, and what towns or cities they lie in;[9] of the geographical position of falls on public navigable rivers, and whether there are or not pilots appointed on it;[10] that other States have constitutions, and of their provisions.[11]

The United States courts will take notice of the situation of a port in a foreign country, and what impediments, if any, exist in its entrance, and whether vessels of a certain draft can enter it.[12]

The court will take judicial notice of general business affairs and of the manner in which ordinary business is conducted. For example the court will take notice of the distinction between a clearance card and a letter of recommendation given by a railroad to an employee,[13] or that drawing a line through a signature is the usual way of cancelling it,[14] or of the fact that but a small percentage of certain railway passengers avail themselves of the privileges of transfer and stopover,[15] or of the fact that a telegraph is

[1] Oppenheim v. Wolf, 3 Sandf. Ch. (N. Y.) 571.

[2] Lazier v. Westcott, 26 N. Y. 146; Cooke v. Wilson, 37 Eng. Law & Eq. 361.

[3] Grierson v. Eyrie, 9 Ves. 347.

[4] Taylor v. Barclay, 2 Sim. 213.

[5] Dolder v. Huntingfield, 11 Ves. 292.

[6] Rex v. De Berenger, 3 M. & S. 67.

[7] Rex v. Withers, 5 T. R. 442.

[8] Price v. Page, 24 Mo. 65; City Council of Montgomery v. M. & W. Plank Road Co., 31 Ala. 79.

[9] City Council of Montgomery v. M. & W. Plank Road Co., *ante*.

[10] Cash v. Clarke & Co., 7 Ind. 227.

[11] Butcher v. Brownsville, 2 Kan. 70.

[12] The Peterhoff, Blatchford's Prize Cases, 463.

[13] Cleveland, etc., Ry. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296.

[14] Samberg v. American Express Co., (Mich., 1904), 99 N. W. 879.

[15] Edson v. Southern Pacific R. Co., 144 Cal. 182, 77 Pac. 894.

necessary for the operation of a railroad, but not of the space required for the repair of such a telegraph, the latter being a proper subject of expert evidence.[16] So the courts may take judicial notice that telegraph poles must be set near the side of the street or road and that they are generally outside of the curb or the ditch line and therefore necessarily in line with the trees,[17] or in a patent case that hoppers with chutes beneath them are commonly used for grain elevators and other purposes.[18] The court may take judicial notice of the history of banking, showing the savings banks with special charters to be the successors of the former State banks of circulation,[19] or that in 1895 the current rate of interests on moneyed securities exceeded one and three-quarters per cent.[20] The court judicially knows that contracts for a water supply although containing a provision for forfeiture, from their very character are so necessary and urgent to municipal existence that they will be carried forward by some one if not by the original projectors.[21]

The court will take judicial notice of the fact that all taxes on the assessment roll are never collected until years after their assessment,[21a] or in construing a regulation of automobiles will take judicial notice of their characteristics.[21b]

So the court may take notice judicially of well-known matters of public health as that Texas or splenitic fever in cattle is infectious or contagious,[22] or that a disease called "yellows" exists in the State which is very dangerous to peach trees,[23] or that cigarettes are wholly noxious and deleterious to health,[24] or of the fact that wine is an intoxicating liquor,[25] or of the nature of vaccination,[26] or that the manufacture of wearing apparel in unsani-

[16] P. & H. H. Youree v. Vicksburg S. & P. R. Co., 110 La. 791, 34 So. 779.

[17] Wyant v. Central Tel. Co., 120 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155.

[18] Black Diamond Co. v. Excelsior Co., 156 U. S. 611, 616, 15 S. Ct. 482.

[19] State v. Franklin County Savings Bank & Trust Co., 74 Vt. 246, 52 A. 1069.

[20] New Haven Trust Co. v. Doherty, 75 Conn. 555, 51 A. 130.

[21] Bienville Water Supply Co. v. Mobile, 112 Ala. 260, 20 So. 742, 57 Am. St. Rep. 28.

[21a] State v. Multy (Wash., 1905), 82 P. 118.

[21b] *Ex parte* Berry, (Cal., 1905), 82 P. 44.

[22] Dorr Cattle Co. v. Chicago & G. W. Ry. Co. (Iowa, 1905), 103 N. W. 1003.

[23] State v. Main, 69 Comm. 123, 37 A. 80, 61 Am. St. Rep. 30.

[24] Austin v. State, 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703.

[25] Wolf v. State, 59 Ark. 297, 27 S. W. 77, 43 Am. St. Rep. 34.

[26] Commonwealth v. Pear, 183 Mass. 242, 66 N. E. R. 719.

tory apartments is likely to promote the spread of disease.[27] But the court will not take judicial notice that a man is in great danger of catching a disease called glanders by coming in contract with a horse having that disease as it is "not a disease so frequently taken by man as to permit the court to take judicial notice of its character."[28]

The court may exercise its knowledge of the well-known resources of the State, as that phospate is produced in some portions of the State and is an article of transportation,[29] or of the fact that natural gas no longer exists in a certain district in sufficient quantities to supply a certain city, and that it would be useless to sink a well,[30] or that gas or oil does not exist under all the lands within the recognized gas or oil district and that there is no other generally acknowledged way than putting down a well to determine whether or not it does exist.[31]

The court will take judicial notice of the laws of nature and of nature's powers and forces and thereafter to that which is known as electricity and of its properties; not, of course, of the various methods of generating and transmitting or of using if, but of the thing itself and of its nature.[32] The court does not know judicially that a powder magazine may not be constructed so as to insure absolute security from lightning, but it does know that the use of dynamite as an explosive is intrinsically dangerous.[34] So in an action for injury from the explosion of natural gas which the defendant had omitted to turn off, the court can say as a matter of common knowledge that the injury was not due to spontaneous combustion and that it was impossible without some agency acting upon the leaking gas.[35]

Sec. 178. Statutes and Common Law of other States.[a]

While courts will take judicial notice of all the public statutes and laws of the State, yet they will not take judicial notice of the

[27] State v. Hyman, 98 Md. 596, 57 A. 6, 11.

[28] State v. Fox, 79 Md. 514, 29 A. 601, 47 Am. St. Rep. 424.

[29] State v. Atlantic Coast Line R. Co. (Fla., 1904), 37 So. 652.

[30] State v. Indianapolis Gas Co., (Ind., 1904), 71 N. E. 139.

[31] Consumers Gas Trust Co. v. Littler, 162 Indiana, 320, 70 N. E. R. 363.

[32] City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214.

[33] Kinney v. Koopman, 116 Ala. 310, 22 So. 593, 67 Am. St. Rep. 119.

[34] Fitzsimmons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. R. 249.

[35] McGahan v. Indianapolis Natural Gas Co., 140 Ind. 335, 37 N. E. 601, 49 Am. St. Rep. 199.

[a] As to proof of law of other states see §§ 194, 195, *post*.

statutes or common law of another State, but any person relying upon such statute or common law of another State must prove them, as any other fact is proved.[1]

But where an action is brought upon the judgment of another State, courts will take judicial notice of the laws of such State, so far as relates to the judgment.[2]

In the absence of allegations or proof to the contrary, courts will presume that the laws of another State or country are similar to those in the State in which the action is tried, and if different, the party relying upon the distinction must prove what the law really is in the State, the benefit of whose laws he invokes.[3]

Some courts presume that the statutes of another State are the same as those of the former, in the absence of proof,[4] but the better

[1] Lloyd v. Matthews, 155 U. S. 222, 227, 15 S. C. 70; Schultz v. Howard, 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470; Crandell v. Great Northern Ry. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458; Davenport v. Gannon, 123 N. C. 362, 31 S. E. 858, 68 Am. St. Rep. 827; National Bank of Commerce v. Kervey, Texas, , 83 S. W. 368; Equitable Bldg. & Loan Assn. v. King (Fla., 1904), 37 So. 181. It must be asumed that the law in England as well as in sister States is, in the absence of proof to the contrary, the same as the law of the forum. Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am. St. Rep. 118. The courts of one State cannot take judicial notice of the constitution or statutes of another nor of their interpretation by the highest court of that State. Murtey v. Allen, 71 Vermont, 377, 45 A. 752, 76 Am. St. Rep. 779. There is no presumption that the law merchant as to negotiable instruments prevails in Turkey, but it must be proved like any other fact. Aslanian v. Dostumian, 174 Mass. 328, 54 N. E. 845, 75 Am. St. Rep. 348; Chumasero v. Gilbert, 24 Ill. 293; Wood *et al.* v. O'Connor, 28 Vt. 776; Rape v. Heaton, 9 Wis. 328; Charlotte v. Choteau, 25 Mo. 465; Stokes v. Macken, 61 Barb. (N. Y.) 145; Heathorn v. Shepherd, 1 Blackf. (Ind.) 159; Anderson v. Anderson, 25 Tex. 637; Candit v. Blackwell, 4 Green (N. J.), 193; Brimhall v. Van Campen, 8 Minn. 13; Bemis v. McKenzie, 13 Fla. 553.

[2] Paine v. Schenectady Ins. Co., 11 R. I. 411. But see Hobbs v. Memphis, etc., R. R. Co., 9 Heisk. (Tenn.) 873.

[3] Peter Adams Paper Co. v. Cassard, 206 Penn. 179, 55 A. 949; Bemis v. McKenzie, 13 Fla. 553; Taylor v. Boardman, 25 Vt. 581; Stokes v. Macken, 62 Barb. (N. Y.) 145; Anderson v. Anderson, 23 Tex. 639; Folk v. Folk, id. 653; Carey v. R. R. Co., 5 Clarke (Iowa), 357; Fellows v. Menasha, 11 Wis. 558; Rape v. Heaton, 9 Wis. 328; Simms v. Express Co., 38 Ga. 129; Hoyt v. McNill, 13 Minn. 390; Stevens v. Boomer 9 Humph. (Tenn.) 546; Temple v. Hager, 27 Cal. 163; Hammond v. Inloes, 4 Md. 138; Palfrey v. Portland, etc., R. R. Co., 4 Allen (Mas.), 55.

[4] Cavallaro v. Texas & Pacific Ry. Co., 110 Cal. 348, 52 Am. St. Rep. 94, 42 P. 918; Wilhite v. Skelton (Indian Territory), 82 S. W. 932, 935; Goodwin v. Provident Savings Life, etc., Association, 97 Iowa, 226, 66 N. W. 157, 59 Am. St. Rep. 411; Barringer v. Ryder, 119 Iowa, 121, 93 N. W. 56; Mutual Home & Savings Association v. Worz, 67 Kan. 506, 73 Pac. 116; Chapman v. Brewer, 43 Neb. 890, 62 N. W. 320, 47 Am. St. Rep. 779; Welton v. Atkinson, 55 Neb. 674, 76 N. W. 473, 70 Am. St.

rule would seem to be that in the absence of proof the common law is presumed to prevail, interpreted as in the forum,[5] except in jurisdictions governed by some other system of law,[6] and that there is no presumption at all as to the statutory law.[7]

Where some items of costs in a case occurred out of the State they must be taxed according to the laws of the forum, where the laws of the foreign jurisdiction are not put in evidence.[8] Neither a judicial decision nor a statute of another State will be judicially noticed except for the purpose of construing the laws of the State

Rep. 416; Second National Bank v. Smith, 118 Wis 18, 94 N. W. 664; Edleman v. Edleman (Wis., 1905), 104 N. W. 56. "It may be well said that, as we judicially know no other law of the case than our own, the parties litigant, by failing to produce the *lex loci contractus*, impliedly agree that it is the same as the *lex fori*, be the latter common law or statute. Thus, it may be regarded as settled in this State that when a contract, made in a State or country wherein we cannot presume the existence of the common law, is sought to be enforced in the courts of this State, and the *lex loci* is not produced, we will apply to our own law." Peet v. Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45. But see Birmingham Water Works Co. v. Howe, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43. But even in Wisconsin the presumption as to statutory law will not be extended to statutes penal in nature. St. Sure v. Lindsfelt, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50.

[5] Baltimore & O. S. W. R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. R. 136, exemption laws; Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. R. 45; Penn. Mutual Life Insurance Co. v. Norcross (Ind., 1904), 72 N. E. 132; Klenke v. Noonan, Ky. 81 S. W. 241; Myers v. Chicago, etc., R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579; Engstrand v. Kleffand, 86 Minn. 403, 90 N. W. 1054, 91 Am. St. Rep. 359; Hazen v. Mathews, 184 Mass. 388, 68 N. E. R. 838; Baird v. Vines (S. D. 1904) 99 N. W. R. 89; *In re* Harrington's Estate, 140 Cal. 244, 294, 73 Pac. 1000; Rosemand v. Southern Ry. 66 S. C. 91, 44 S. E. 574.

[6] There is no presumption of the existence of the common law in the State of Louisiana. It is only in those States having a common origin or populated by citizens coming from States which have such common origin that the presumption of the existence of the common law therein obtains. Louisiana is not one of those States. Peet v. Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45. But the law of Italy as to the validity of a clause in a contract as to the exclusive jurisdiction of courts is presumed to be like that of Massachusetts. Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. R. 425.

[7] Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389; Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456; Burdict v. Missouri Pacific Ry. Co., 123 Mo. 221, 27 S. W. 453, 45 Am. St. Rep. 528. In the absence of evidence it will be presumed that the usury law of another State is that of the common law and not that the laws of another State are like the statutes of the forum on the subject of usury. Columbian Building & Loan Association v. Rice, S. C., 47 S. E. 63. There is no presumption that the statute law of another State is the same as the statute law of the forum even though the State of the forum has a statute on the subject. Meuer v. Chicago, etc., Ry. Co., 11 S. D. 94, 75 N. W. 823, 74 Am. St. Rep. 774; State v. Shattuck, 69 Vermont, 403, 38 A. 81, 60 Am. St. Rep. 936.

[8] Dignan v. Nelson, 26 Utah, 186, 72 Pac. 936.

of the forum or determining what they are.[9] But when the laws of the State in which the trial is had recognize official acts done under the laws of another State, the courts of the State recognizing such acts will take judicial notice of the laws of such other State, so far as is necessary to determine the validity of the acts alleged to be in conformity with them.[10] So when the statutes of another State upon a particular matter have been made the subject of a judicial decision in a State, the courts of such State will take judicial notice of it, and if the statute has been repealed or altered, proof of such repeal or alteration must be duly made.[11] But the presumption that other States have adopted the same laws does not extend to laws imposing a penalty or forfeiture.[12]

When laws are unwritten, they may be proved by parol; but when written as statute laws, they must be proved by the production of the laws themselves.[13]

When the statute of another State has been incorporated into an act of congress, it will be recognized without other proof.[14]

When the laws of one State or nation are, or ever have been, operative in another, as where a State has formerly wholly or in part been under the jurisdiction and laws of another State, the laws then in existence need not be proved. So, too, where the State has formerly been under the jurisdiction of a foreign government. The federal courts will judicially notice the laws prevailing in a part of the country before cession to the United States, as they are not treated as foreign laws.[15] Thus, where a State has formerly been under Spanish or Mexican government, the courts of such States will judicially notice the laws of such governments in force at that time, so far as necessary in the action pending before it.[16] So courts will take judicial notice of all public bodies

[9] Ferd Heim Brewing Co. v. Gimber, 67 Kan. 834, 72 Pac. 859. See, also, Poll v. Hicks, 67 Kan. 191, 72 Pac. 847.

[10] Carpenter v. Dexter, 8 Wall. (U. S.) 513.

[11] Graham v. Williams, 21 La. Ann. 594.

[12] Hull v. Augustine, 23 Wis. 383; Campion v. Kille, 2 McCarter (N. J.), 476; Cutter v. Wright, 22 N. Y. 472; Billingsby v. Dean, 11 Ind. 331.

[13] Taylor v. Runyan, 9 Iowa, 522; Stevens v. Boomer, 9 Humph. (Tenn.) 546; Crosby v. Huston, 1 Tex. 203; Brimhall v. Van Campen, 8 Minn. 13; Woodward v. O'Connor, 28 Vt. 776.

[14] Flannigan v. Washington Ins. Co., 7 Penn. St. 306; United States v. Turner, 11 How. (U. S.) 663; United States v. Phila. & N. O., id. 684.

[15] United States v. Choves, 159 U. S. 452, 459, 16 S. Ct. 57. (Laws of Mexico noticed as affecting title to land in New Mexico.)

[16] Doe v. Eslaner, 11 Ala. 1028; Choteau v. Pierre, 9 Mo. 3; Ott v. Soulard, id. 581.

incorporated by the State,[17] or of all acts of incorporation made public by statute.[18]

The common law of all the States is presumed to be the same, and if different, it must be proved by the evidence of some person familiar with it.[19] Or the court *may* act upon its own knowledge of the law of another State, and if it errs as to its knowledge thereof, the judgment will be reversed.[20] But the United States courts are presumed to know the laws of the several States, and will take judicial notice thereof.[21]

In the case of isolated and peculiar nations not holding diplomatic relations with this country, parol evidence will be received as to its laws, but such evidence will only be allowed as conclusive when it is so direct and positive as to leave no doubt or ambiguity.[22] State courts will take judicial notice of all public acts of congress,[23] and pamphlets issued by government containing them may be read;[24] and of laws relating specially to the State in which the trial is had;[25] and of a decision of the United States Supreme Court as to the validity under the federal constitution of a State law;[26] and of all treaties made with foreign governments, and of the power of the president under the same, but not whether the powers under it have been exercised.[27] So of the survey of lands in the State under acts of congress, and the dedication of portions of them to certain purposes.[28] Whether courts will take judicial notice of acts of congress relating only to the District of Columbia *quere*.[29] And when a transaction otherwise lawful is unlawful by reason of provisions in acts of congress, the court will dismiss the

[17] Jones v. Fales, 4 Mass. 245.

[18] Russell v. Branham, 8 Blackf. (Ind.) 277.

[19] Warner v. Lusk, 16 Mo. 102; Nunno v. Davis, 7 Tex. 26; Bemis v. McKenzie, 13 Fla. 553; Stokes v. Macken, 62 Barb. (N. Y.) 145.

[20] State v. Delesdinier, 7 Tex. 26.

[21] Jasper v. Porter, 2 McLean (U. S.), 579; Merrill v. Dawson, Hunt (U. S.), 563; Jones v. Hays, 4 McLean (U. S.), 521; Wadsworth v. Spafford, 2 id. 168.

[22] Wilcox v. Phillips, Wallace, Jr. (U. S.) 47.

[23] Metropolitan Stock Exchange v. Lyndonville Nat. Bank, 76 Vt. 303, 57 A. 101; Kansas City M. & B. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457.

[24] Hammond v. Inloes, 4 Md. 138; White v. Guirons, Minor (Ala.), 331; Temple v. Hagar, 27 Cal. 163; Anonymous, Buller's N. P. 222; Burmand v. Nirat, 1 C. & P. 578; Bird v. State, 21 Gratt. (Va.) 800; Adm'r v. Chubb, 16 Gratt. 284; Wright v. Hawkins, 28 Tex. 452; Buchanan v. Whitman, 36 Ind. 257.

[25] Papin v. Ryan, 32 Miss. 21.

[26] State v. Bates, 22 Utah, 65, 61 P. 905, 83 Am. St. Rep. 768.

[27] Dale v. Wilson, 16 Minn. 525; Carson v. Smith, 5 id. 78; Montgomery v. Duley, 3 Wis. 709.

[28] Dickenson v. Bruden, 30 Ill. 279; Atwater v. Schenck, 8 Wis. 160.

[29] Adm'r v. Chubb, 16 Gratt. (Va.) 284, yes; Wright v. Paton, 10 Johns. (N. Y.) 300, no.

action, even though the point is not raised by the defense.[30] So, too, courts will take judicial notice of the laying out and surveying of lands under acts of congress, and of the method of their boundaries and descriptions;[31] and of the geographical divisions of the State when necessary to the determination of a question.[32] So the federal courts will take judicial notice of State public laws.[33] Courts are bound to know the rules of the Court of Chancery;[34] so their own rules;[35] but not the rules of another court,[36] or a scale of fees adopted by it under the provisions of a statute.[37]

Nor of the rules and regulations adopted by any public board or body, whether national or State, but such regulations, if relied upon, must be proved.[38] Nor of the rules or regulations of any church or society.[39] Nor of the customs or regulations of any particular trade.[40] Courts will take judicial notice of the time when State and national laws go into effect.[41] So of their repeal, or any changes therein.[42] All acts found among the public laws, bearing the governor's signature, are presumed to have been constitutionally passed.[43]

All acts of the legislature are presumed to have been constitutionally passed, and so far as extrinsic evidence is concerned, this presumption is conclusive.[44]

But in Illinois it is held that the contrary may be proved by the production of a duly certified copy of the legislative journal, but not by reference to the original journal, as the courts do not take

[30] Kessel v. Albertis, 56 Barb. (N. Y.) 362.

[31] Buchanan v. Whiteman, 36 Ind. 25; Atwater v. Schenck, 9 Wis. 160; Dickenson v. Breeden, 30 Ill. 279.

[32] Hinckley v. Beewith, 23 Wis. 328; Fancher v. De Montague, 1 Head. (Tenn.) 41; Mossman v. Forrest, 27 Ind. 333; Commissioners v. Spetter, 13 Ind. 235; Winnepisseogee Lake Co. v. Young, 40 N. H. 420; King v. Kent, 29 Ala. 542; Martin v. Martin, 51 Me. 366; Gilbert v. Moline, 19 Iowa, 319; Rock Island v. Steele, 31 Ill. 543.

[33] Union Pac. R. Co. v. Wyler, 158 U. S. 285, 296, 15 S. Ct. 877.

[34] Carter v. Pratt, 9 Md. 67.

[35] Cherry v. Baker, 17 Md. 75; Pugh v. Robinson, 1 Tenn. 118.

[36] Scott v. Scott, 17 Md. 78; Van Sandan v. Turner, L. J. (U. S.) 154.

[37] Pilkington v. Cooke, 17 L. J. 141.

[38] Hensley v. Tarpey, 7 Cal. 288; Palmer v. Aldridge, 16 Barb. (N. Y.) 131.

[39] Young v. Ransom, 31 Barb. (N. Y.) 49.

[40] Dulch & Co. v. Mooney, 12 Cal. 534.

[41] State v. Bailey, 16 Ind. 46; Heuston v. Cincinnati, etc., R. R. Co., id. 275; Berliner v. Waterloo, 14 Wis. 378; Attorney-General v. Foote, 11 id. 14.

[42] State v. O'Connor, 13 La. An. 486.

[43] Ill. Cent. R. R Co. v. Wren, 43 Ill. 77; Bedard v. Hall, 44 id. 91.

[44] People v. Mahany, 13 Mich. 481.

judicial notice of such journals or of their genuineness.[45] So courts take judicial notice of the maritime law.[46] Courts will not take notice of the rates of interest in another country or State, nor in the absence of proof will they presume that interest is allowed upon a contract, note or other obligation, made in such country or State.[47]

The court may take judicial notice of the fact that the civil law is the basis of the law of Mexico as a matter of history, but will not take judicial notice of details, as of the duration of infancy in Mexico.[48]

Sec. 179. As to Judicial Records.

Courts will take judicial notice of their own records and of their genuineness,[1] and of the records in a case on trial.[2] The Appellate court will take judicial notice that a certain person who signed a judicial record was the judge of a lower court in the State.[3] On a motion to dismiss an appeal the signature of a party waiving notice of appeal will be judicially noticed. The court will not judicially notice the signature of a party unaccompanied by proofs of its genuineness when it is sought to show thereby the service of an original process, but after the party has once appeared in an action his signature may be judicially noticed.[4] But they will not in one case take judicial notice of the record in another case pending in the same court.[5] Nor that other suits are pending in the same court involving the same questions.[6] Nor of the pendency of actions in the federal courts to settle the same questions.[7] Nor will they take judicial notice of anything outside the record. Hence when the record does not show that a declaration was filed in the cause, it will not be presumed that one was filed.[8] Nor will they take judicial notice that a *nolle pros.* or *con-*

[45] Grab v. Cushman, 45 Ill. 119; Coleman v. Dobbins, 9 Ind. 156.

[46] Chandler v. Graves, 2 H. Blackstone, 606.

[47] Ingram v. Drinkard, 14 Tex. 351; Cooke v. Crawford, 1 id. 9; Cavender v. Guild, 4 Cal. 250; Ramsay v. McCawley, 2 Tex. 189.

[48] Banco de Sonora v. Bankers' Mut. Casualty Co., 124 Iowa, 576, 95 N. W. 232.

[1] State v. Postlethwaite, 14 Iowa, 446; State v. Schilling, id. 455.

[2] State v. Bates, 22 Utah, 65, 61 P. 905, 83 Am. St. Rep. 768; Pagett v. Curtis, 15 La. Ann. 551.

[3] Fisher v. City of Chicago, 213 Ill. 268, 72 N. E. 680.

[4] Tischner v. Rutledge, 35 Wash. 285, 77 Pac. 388.

[5] People v. De La Guerre, 24 Cal. 73.

[6] Lake Merud Water Co. v. Cowles, 31 Cal. 215.

[7] Vassault v. Seitz, 31 Cal. 225.

[8] Dart v. Lowe, 5 Ind. 131.

viction was entered by them in an action in another county.[9] But a pleading to which a demurrer is taken may be aided by the court taking judicial notice of certain well-known facts insufficiently alleged in the pleading and necessary to it.[10] In an action upon a judgment for alimony rendered in another State the State court will take judicial notice that under the laws of the other State the court rendering the judgment had jurisdiction to do so.[11]

United States courts will take judicial notice that a discharge in bankruptcy has been regularly obtained.[12] Courts will not take judicial notice of the genuineness of the signatures of the parties in a cause.[13]

Sec. 180. Miscellaneous Matters.

The courts will take judicial notice of the contents of the Bible, that the religious world is divided into numerous sects and of the general doctrine that is maintained by the different sects, that some of the sects believe in the doctrine of predestination and apostolic succession, while some do not.[1] Even though the plaintiff claims that a child of two years of age had earning capacity of value to its parents, the court can take judicial notice that a child of such tender years could have no earning capacity.[2] The courtmay take judicial notice that $50 is a reasonable attorney's fee for the collection of a note on which $268 is due,[3] or that "brass knuckles" is an instrument which may be made of other metals than brass,[4] but not of the weight of artificial legs on the question of damages for personal injuries.[5] It has been held the jury could not assume without testimony to aid them, that an electric car could be stopped in a distance of one hundred and fifty feet.[6]

The courts take notice of the meaning of English words, as

[9] State v. Edwards, 19 Wis. 674.

[10] De Baker v. Southern California Ry. Co., 106 Cal. 257, 39 P. 610, 46 Am. St. Rep. 237.

[11] Trowbridge v. Spinning, 23 Wash. 48, 62 P. 125, 83 Am. St. Rep. 806; Kunze v. Kunze, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857.

[12] Lathrop v. Stewart, 5 McLean (U. S.), 167.

[13] Alderson v. Bell, 9 Cal. 315.

[1] State v. District Board, Edgerton, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41.

[2] Southern Railway Co. v. Covenia, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312.

[3] Warnock v. Itawis (Wash., 1905), 80 Pac. 297. Cf. note 30, *infra*.

[4] Louis v. State, 36 Tex. Crim. Rep. 52, 35 S. W. 377, 61 Am. St. Rep. 832.

[5] Carrow v. Barre R. Co., 74 Vt. 176, 52 A. 537.

[6] Kotila v. Houghton County St. Ry. Co., 134 Mich. 314, 96 N. W. 437.

"tomatoes," and upon such a question, dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.[7] The court will take judicial notice of customary abbreviations of all kinds, so a will dated "Nov. 22, '97," is properly dated within a statutory requirement,[8] and the court will take judicial notice of the meaning and effect of the letters "f. o. b." used in mercantile contracts.[9] While the court will judicially notice all the vernacular which is part of the English language, a custom to use certain signs in description of real estate will not be admissible in evidence although claimed to extend over two States.[10]

Standard mortality tables, as the Carlisle tables, may be given in evidence, as bearing upon the probable length of life of an individual, and will be judicially noticed as authoritative,[11] whether they were introduced in evidence or not,[12] and without proof of their correctness,[13] as the court is presumed to know them whenever it sees them.[14] A State court will take judicial notice of the existence and jurisdiction of an inferior court in the State,[15] or of the district of a certain justice of the peace.[16] Courts will not take judicial notice of the place of intersection of a street in a city with a railroad track;[17] nor of the meaning of "C. O. D.";[18] nor that kerosene oil is a refined coal oil or a refined earth oil.[19] But under the rule that courts will take judicial notice of matters well established in the arts and sciences, there seems to be no good reason why they should not judicially know what everybody

[7] Nix v. Hedden, 149 U. S. 304, 307, 13 S. Ct. 881.

[8] Estate of Lakemeyer, 135 Cal. 28, 66 P. 961, 87 Am. St. Rep. 96. See, also, Dages v. Brake, 125 Mich. 64, 83 N. W. 1039, 84 Am. St. Rep. 556.

[9] Vogt v. Shienebech (Wis., 1904), 100 N. W. 820.

[10] Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511.

[11] Steinbrunner v. Pittsburg, etc., Ry. Co., 146 Penn. State, 504, 23 A. 239, 28 Am. St. Rep. 806, where the court informed itself by reference to the Encyclopaedia Brittanica as to the way the Carlisle table was constructed. Reynolds v. Narraganset Electric Lighting Co. (R. I., 1904), 59 A. 393; Nelson, Adm'r v. Branford Lighting & Water Co., 75 Conn. 548, 54 A. 303, 305.

[12] Lincoln v. Power, 151 U. S. 436, 14 S. Ct. 387.

[13] Western & A. R. Co. v. Cox, 115 Ga. 715, 42 S. E. 74.

[14] Atlanta Railway & Power Co. v. Monk, 118 Ga. 449, 45 S. E. 494.

[15] Gudger v. Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73.

[16] Russell v. Huntsville Ry. Light & Power Co., 137 Ala. 627, 34 So. 855.

[17] Pennsylvania Co. v. France, 13 Ill. App. 91; People v. Callahan, 23 How. (N. Y.) 58. But see Brady v. Pope, 59 Cal. 52, and *quere*.

[18] McNichols v. Pacific Express, 12 Mo. App. 401. But *contra* see State v. Intoxicating Liquors, 73 Me. 278.

[19] Bennett v. North British, etc., Ins. Co., 8 Daly (N. Y. C. P.), 471.

else knows, that kerosene, an article so extensively used, is a refined coal or earth oil. But there seems to be no fixed rule upon which courts act in determining these questions, but they seem to act according to their peculiar caprices. Thus, in most of the States it is held that courts will take judicial notice that lager beer is a malt liquor and is intoxicating,[20] but in others, although they take judicial notice that whiskey is intoxicating,[21] yet they will not take judicial notice that malt liquors are,[22] and yet the one fact is as generally known and as well established as the other. The United States courts take judicial notice of the character, construction and use of a manufactured article which has been in use for many years, such as an ice-cream freezer, etc.[23] So it has been held that courts will take judicial notice of the art of photography, the mechanical and chemical process employed, the scientific principles on which they are based, and their results.[24] So, too, they would doubtless take judicial notice that opium, arsenic, prussic acid, etc., are deadly poisons, but the knowledge of these facts is no more general than that kerosene is a coal oil, or that malt liquors are intoxicating. Courts will not take judicial notice of facts not in themselves of judicial cognizance, as that Daniel Webster does not reside in the State of New York,[25] but will take judicial notice that "beer" is a malt and intoxicating liquor,[26] and the same is true as to "ale,"[27] "strong beer,"[28] "lager beer,"[29] or any species of liquors which common experience has demonstrated are intoxicating. The courts will not take judicial notice of the value of an attorney's services in a case tried before it;[30] nor what is a fair and reasonable or usual commission on acceptances;[31] nor of the ordinary abbreviation of *proper* names.[32] But, *contra,* see where it was held that a note signed "Christ. A."

[20] State v. Gazette, 11 R. I. 592; Adler v. State, 55 Ala. 16; Watson v. State, 55 id. 158.

[21] Schlicht v. State, 56 Ind. 173; Carman v. State, 18 Ind. 54.

[22] Shaw v. State, 55 Ind. 188; People v. Hait, 24 How. Pr. (N. Y.) 289.

[23] Brown v. Piper, 91 U. S. 37.

[24] Lake v. Calhoun Co., 52 Ala. 115.

[25] Wheeler v. Webster, 1 E. D. Smith (N. Y. C. P.), 1; Wilkie v. Bolster, 3 id. 327.

[26] Briffitt v. State, 58 Wis. 39, 46 Am. Rep. 46; People v. Whilock, 3 Parker's Cr. (N. Y.) 9.

[27] Nervin v. Lader, 3 Den. (N. Y.) 437.

[28] Comm's v. Taylor, 21 N. Y. 173.

[29] Rau v. People, 63 N. Y. 277; State v. Gazette, 11 R. I. 592; Com. v. Anthes, 12 Gray (Mass.), 29.

[30] Pearson v. Darrington, 32 Ala. 227. Cf. note 3, *supra.*

[31] Seymour v. Morrow, 11 Barb. (N. Y.) 80.

[32] Weaver v. McElhenon, 13 Mo. 89; Stephens v. State, 11 Ga. 225; Russell v. Martin, 15 Tex. 238.

would be treated as a note signed "Christopher A.;" but will of ordinary abbreviations of common words, as that "adm'r" stands for "administrator;"[33] but not that "John Smith" and "Hon. John Smith" are the same person; but identity of name is *prima facie* evidence of identity of person,[34] and a certificate of birth, death or marriage from the proper office is admissible as evidence, without proof that the person named in the certificate is the same in reference to whom the certificate is to be used as evidence. The identity of name is *prima facie* proof of identity of person, and if not so in fact, the opposite party must prove it.[36] But courts outside the State in which a place is located will not take judicial notice that it is outside the State, as that "New York" is not in the State where the trial is had;[37] or that "New Orleans" is in the State of Louisiana;[38] or that "St. Louis" is in the State of Missouri;[39] or that a note payable at "New Orleans, La.," is payable in New Orleans, State of Louisiana;[40] nor that "Dublin" is in Ireland.[41] But the courts of England do judicially know that "Geelong, Colony of Victoria," is a place outside of England.[42] Forms of attestation in other States must be proved.[43] Quantities of land contained in certain courses and distances must be shown.[44] Courts will not take judicial notice that a woman past 49 years of age is past child-bearing.[45] Courts will not recognize a private seal, whether of an officer or a private person.[46] They will take notice of the seasons, and of the time when certain agricultural products mature, and when the season of harvesting arrives,[47] but not of the vicissitudes incident thereto.[48] So of the ordinary course of transactions of human life, and whatever ought generally to be known, as the peculiar nature of lotteries and how they are generally carried on.[49] But this is so only when the lotteries exist by virtue of State laws. The age of a person, if material, must

[33] Moseley's Adm'r v. Masten, 37 Ala. 216.
[34] Ellsworth v. Moore, 5 Clarke (Iowa), 486.
[35] Gitt v. Watson, 18 Mo. 274.
[36] Hubbard v. Lees, L. R. 1 Exchq. 255.
[37] Bradshaw v. Mayfield, 18 Tex. 21.
[38] Riggins v. Collier, 6 Mo. 568.
[39] Ellis v. Park, 8 Tex. 205.
[40] Russell v. Martin, 15 Tex. 238.
[41] Kearney v. King, 1 Chit. 28.
[42] Cooke v. Wilson, 1 C. B. (N. S.) 153.
[43] Trigg v. Conway, 1 Hemp. (Tenn.) 538.
[44] Tison v. Smith, 8 Tex. 147.
[45] Overhill's Trusts, *In re*, 17 Eng. Law & Eq. 323.
[46] Beach v. Workman, 20 N. H. 379; Barrett Nav. Co. v. Shower, 8 Dowl. (C. P.) 173; Ill. Cent. R. R. Co. v. Johnson, 40 Ill. 35.
[47] Floyd v. Ricks, 14 Ark. 286.
[48] Dixon v. Nichols, 39 Ill. 372.
[49] Boullemet v. State, 28 Ala. 83.

be proved.[50] On the trial of an issue directed by a court of equity, the judge before whom the trial is had will take judicial notice of the terms of the order.[51] So of the day of the week on which a certain day of the month was;[52] that a child born two months after marriage, when the husband had not access to the mother before marriage, is not his child;[53] on what day the king died;[54] of the general law of bankers, and that they have a lien on the securities of their customers for advances made or services rendered;[55] that rain falls.[56] Courts will not take judicial notice of what is meant by the words "whaling voyage" in a policy of insurance,[57] but it will of the meaning of words in certain usual and common combinations.[58]

Sec. 181. Pleading of Statutes Relied on.

If a party relies upon a statute either as a ground of action or defense, he must, notwithstanding the fact that it is a public statute of which the court takes judicial notice, set forth in his declaration, or in his pleadings, such facts as bring him clearly within the provisions of the statute, or if in defense, where no special plea is required, show such facts as bring his case within the statute, and if there are any exceptions or provisos in the act, he must show negatively that the matter pleaded is not within the provisos or exceptions,[1] unless the proviso or exception is in a subsequent substantive clause or statute, and is not connected with the enacting clause by any word of reference, in which case it is a matter of defense for the other party, and need not be negatived in the pleadings.[2] As the court cannot take judicial notice of the statutes of another State it follows that the averments of those statutes in a complaint are binding on demurrer.[3] Where the enacting clause of a statute makes an exception to the general provis-

[50] Stephenson v. State, 28 Ind. 27.
[51] Wood v. Thompson, 1 C. & M. 171.
[52] Hanson v. Shackleton, 4 Dowl. (P. C.) 48.
[53] Rex v. Luffe, 8 East, 202.
[54] Henry v. Cole, 2 Ld. Raym. 811.
[55] Barnett v. Brandon, 6 M. & G. 630.
[56] Fay v. Prentice, 14 L. J. (N. S.) 298.
[57] Child v. Sun Mutual Ins. Co., 3 Sandf. (N. Y.) 26.
[58] Bap. Church v. Brooklyn Fire Ins. Co., 28 N. Y. 153; Downs v. Sprague, 2 Keyes, 57.
[1] Gill v. Scrivens, 7 Durnford & E. 27.
[2] Rex v. Jukes, 8 D. & E. 542; Rex v. Hall, 1 id. 320; Steele v. Smith, 1 B. & Ald. 94.
[3] Hancock National Bank v. Ellis, 166 Mass. 414, 55 Am. St. Rep. 414, 41 N. E. 349.

ions of the act, a party pleading the provisions of the statute must negative the exception, *but* when the exception is contained in a proviso, *and not in the enacting clause,* the party pleading the statute need not negative the exception. *It is for the other party to set it up in avoidance of the other provisions of the statute.*[4] A pleading setting forth the cause of action or defense in the language of the statute relied on, is sufficient,[5] and he need set forth no more facts or circumstances than are necessary to support the pleading under the statute.[6]

There is still another matter which should be borne in mind, and that is, that where a statute gives a remedy where none existed at common law, or where it makes an act lawful which is not so regarded at common law, the party must state in his pleadings, and show upon the trial such a state of facts as brings his case clearly within the provisions of the statute as well as all the amendments thereto. But where the statute is only declaratory of a common-law right, and in aid thereof, unless it in some way varies the standing or rights of parties in court, the statute, or any circumstances bringing the party within the provisions thereof, need not be stated in the pleadings, but otherwise when the statute gives any rights additional to the common-law right, or varies or changes the *status* of the parties.[7]

In actions brought upon a general or public statute, the declaration should state such facts as bring the case within the statute, and should state that the act complained of is contradictory to the statute in such cases made and provided;[8] but if the facts and circumstances set forth in the pleading are sufficient to show that the act charged is in point of fact contrary to the statute relied on, the omission of the words "contrary to the form of the statute," will not be treated as a defect.[9] It is the *substance,* and not the form of the pleading, that controls,[10] and the statute need not be set forth or named in the pleadings, as the courts are bound to take judicial notice of the statute, and whether the facts set forth in

[4] Muller's Case, 4 Ct. of Claims (U. S.), 61; McGlone v. Prosser, 21 Wis. 273; Lynch v. People, 16 Mich. 472.
[5] Gunter v. Dale Co., 44 Ala. 639.
[6] Hewitt v. Harvey, 46 Mo. 368.
[7] Note 2 to Dupa v. Mayo, 1 Wm. Saunders, 276; Erlinger v. Bouceau, 51 Ill. 94; Ryan v. State, 32 Tex. 280; Hastings v. Cunningham, 39 Cal. 137.
[8] Lee v. Clarke, 2 East, 332.
[9] Hewett v. Harvey, 46 Mo. 368.
[10] State v. Dehlinger, 46 Mo. 106.

the pleadings are sufficient to sustain an action or defense under it.[11]

If the action or defense is predicated upon the statute of another State, the statute relied upon must be set forth with distinctness, so that the court can say upon inspection of the plea what the effect of the law is, and a pleading that simply avers that by the laws of the State where the contract was made, certain results would ensue, is not an averment sufficient to support any proof as to what the fact is.[12]

In all actions brought upon a private statute, the act must be recited, and such facts stated as disclose a right of action under it, and no more of the act will be noticed by the court than is set forth in the declaration; and the same is equally true as to the pleadings where the statute is relied upon in defense to an action.[13]

In all cases where the statute is set forth either in the declaration or pleadings, great care should be observed to set it forth correctly, as in the case of a misrecital of a general statute advantage may be taken of it either by general demurrer, motion in arrest, or by writ of error, if the error is in any wise material, and the defect is not cured by verdict. But it seems that the misrecital must be of matter which goes to the ground of the action, or the defect will be cured by verdict.[14]

In the case of a material misrecital of a public act, the court cannot give judgment even with the consent of the parties, for the reason that the courts are bound to take notice of all public acts, and to know that the statute is not as set forth in the pleadings.[15]

So, too, care should be taken never to recite a public statute when its recital is unnecessary, for if it is recited, and incorrectly set forth, the misrecital is fatal if in a material matter;[16] for if a party undertakes to set forth a statute in his pleading, a misrecital is fatal.

But if the misrecital is immaterial or only a trifling variance,

[11] McHarry v. Eastman, 7 Rob. (N. Y.) 137.

[12] Hoyt v. McNeil, 13 Minn. 390; Roots v. Merriweather, 8 Bush. (Ky.), 397.

[13] Kirk v. Nowell, 1 D. & E. 125; Hewett v. Harvey, 46 Mo. 106; Gunter v. Dale Co., 44 Mo. 639.

[14] Rex v. Marsack, 6 D. & E. 776.

[15] Love v. Walton, Cro. Eliz. 245. See, also, State v. Jarrett, 17 Mo. 309, where it was held that where a bill in equity contradicts the provisions of a public statute, the court will take judicial notice thereof, although the question is not raised upon trial.

[16] Boyce v. Whittaker, Doug. 97.

the rule is otherwise,[17] as if a party refers to the wrong section of a public act in his pleading, which is evidently a clerical error, it is wholly immaterial, as the court is bound to take judicial notice of the statutes, and hence is bound to know whether the facts set forth are a ground of action or defense *under any part of the statute;* but if the party recites the portion of the statute in his plea, the rule would be otherwise.[18]

In all cases where the action or defense is predicated upon a private act, so much of the act as is relied on must be accurately set forth in the pleadings, and it is generally better to set it forth *in haec verba,* and if there is a misrecital of the act, advantage must be taken of it by pleading *nul tiel record,* or by demurrer, as the court can take judicial notice of no more of the act than is recited in the pleadings.[19] *Nul tiel record* should not be pleaded when the defect is in reference to such matters as the court judicially notices, but only of such defects as go to the matter or substance of the act; all other defects should be taken advantage of by demurrer.[20]

Public acts need not be proved, as the courts are bound to know their provisions; but if *nul tiel record* be pleaded private acts must be proved by an exemplified copy of the act,[21] or by the production of a printed copy thereof, printed by the State printer.[22] When a private act is duly certified under the seal of the State, it cannot be impeached by the legislative journals.[23] And it is not competent for the court in an ordinary civil suit *inter partes* to permit any inquiry to be made into the correctness of the Revised Statutes duly certified and deposited in the office of the secretary of State, and that such statutes, so certified, import absolutely verity, as the records of the legislature.[24]

Public acts, being general laws, are presumed to be known to every person, as well to the the jury as to the court, and need not be proved; but private acts must be proved by a duly exemplified copy,[25] or by a copy printed by the king's printer and under

[17] Goodwin v. West, Cro. Car. 522; Anonymous, 2 Ventris, 215.

[18] McHarvy v. Eastman, 7 Robt. (N. Y.) 137.

[19] Spring v. Eve, 2 Mod. 241; Platt v. Hill, 1 Ld. Raymond, 382.

[20] Rex. v. Wilde, 1 Lev. 296; Boyce v. Whittaker, Doug. 97. See, also, Moulson v. Redshaw, 1 Saund. 193, where the practice in reference to pleading private acts is thoroughly discussed.

[21] Anonymous, 2 Salk. 566.

[22] Rex v. Shaw, 12 East, 497.

[23] Rex v. Arundel, Hob. 110.

[24] Eld v. Gorham, 20 Conn. 8.

[25] 1 Phillips on Ev. 364; 1 Starkie on Ev. 163.

authority.[26] And this extends to laws of a foreign country when they are found in the statutes of that country, accompanied with proof of their official publication;[27] and the laws of another State.[28] But the book must be authenticated under the seal of the secretary of State.[29]

[26] Rex v. Shaw, 12 East, 479.
[27] O'Keefe v. United States, 5 Ct. of Claims, 674.
[28] Zimmerman v. Helsler, 32 Md. 274.
[29] Babcock v. Babcock, 46 Mo. 243.

CHAPTER XVIII.

Burden of Proof.

Section 182. General object of evidence.
183. Fraud.
184. Burden as to negative propositions.
185. Presumption of innocence.
186. Burden in case of lost notes.
187. Who is to begin.
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Sec. 182. General Object of Evidence.

The object of evidence is to establish the issues between the parties, and to this end three general rules must be observed: 1st, *the evidence must be confined to the issue;* 2d, *only the substance of the issue need be proved,* and 3d, *the burden of proof lies upon the party asserting an affimative fact,* unless it is supported by some adequate presumption.[1] This must, however, be understood as applying to a material and substantial issue, and is a rule which rests upon the broad ground of protection to the rights of parties, and has for its base that sound public policy which courts ever regard with strict exactness. Mere convenience either of parties or courts is not generally allowed to weigh against actual rights, and the better reason for the rule would seem to be, that when a person, by an allegation in his declaration or plea, asserts that which, if true, shows a legal right in him to recover damages of another, or which shows a legal and valid excuse against an apparent legal claim, public policy and the protection of the rights of parties require that the party making such an allegation should take the burden of its support, otherwise the rights of parties would be in constant jeopardy by their being compelled to disprove issues without foundation or validity.

The term "burden of proof" is used in different senses. In one sense the term marks or expresses the burden or duty of the

[1] Pussey v. Wright, 31 Penn. St. 387; Costigan v. Mohawk, etc., R. R. Co., 2 Den. (N. Y.) 609; Powers v. Russell, 13 Pick. (Mass.) 69; Kyle v. Colmes, 2 Miss. 121; Thompson v. Lee, 8 Cal. 275; Nash v. Hall, 4 Ind. 444; Stevenson v. Maroney, 29 Ill. 582.

actor or party who has the risk or affirmative of the issue and will lose the case if he does not in the end establish such issue. In another sense the term means or expresses the burden or duty of a party, in order to succeed, of going forward at any particular stage with the evidence, and really means that the burden is upon him to establish the particular claim, while the burden of the issue—that is, the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence—never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. In general, the party who seeks to move a court in his favor, whether as an original plaintiff or as a defendant, who by admitting plaintiff's contention and setting up an affirmative defense becomes the real actor, must establish his claim.[2]

The real test by which to determine upon whom the burden of proof lies is to be found by ascertaining which party would be

[2] United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803. The burden of proof in its proper sense does not ordinarily shift from one party to the other so long as the parties remain at issue upon a proposition affirmed upon the one side and denied upon the other. So where a contestant of a will shows various circumstances tending to show undue influence, as that a certain party benefited from the will and was in close confidential relations to the testator, this evidence is properly considered by the jury but it does not shift the burden of proof. This burden upon the whole evidence, in view of the situation referred to and of the other circumstances, is still upon the contestant who is to sustain the proposition confirmed by him by a preponderance of all the evidence. Such evidence does not raise a presumption of law of undue influence as the issue is one of fact and the court disapproves of a statement that any particular evidence is sufficient to change the issue from one of fact to one of law. Appeal of O'Brien (Maine, 1905), 60 A. 880. The term "burden of proof" is an ambiguous one. It may be used to indicate the burden which rests on every party to a cause, presenting a claim for relief or pleading in avoidance, of going forward, if he be met by a traverse, and establishing what is well defined by an authoritative writer on the law of evidence, who has done much toward setting it in scientific form, as "the total proposition or series of propositions which constitute his disputed case." Thayer's Preliminary Treatise on Evidence, 380. It may also be used to denote a duty cast by law upon one party to meet and rebut the effect of some piece of evidence introduced by the other, by proof of what may suffice to overbear it in the mind of the trier. Baxter v. Camp, 71 Conn. 245, 41 A. 803, 71 Am. St. Rep. 169. The phrase is also commonly used indiscriminately to denote either or both of the above uses. Thayer's Preliminary Treatise, 355. There has been much confusion caused by a failure to distinguish between the burden of proof and the weight of evidence. The burden of proof is always upon the party asserting a fact as the basis of his action or defense, and it never shifts

entitled to a verdict if no proof was offered on either side, for the burden lies upon him against whom the verdict should be given in such a case;[3] and when the burden lies upon a party, he is bound to prove each and every circumstance essential to charge the other party in the same manner as if the whole issue rested upon him, whether plaintiff or defendant;[4] and the issue must be supported by him by a fair balance of evidence, so that a conclusion can fairly be drawn in his favor by the jury, or the verdict must be for the other party.

If the burden of proof lies upon the plaintiff or defendant, it cannot be changed and thrown upon another by the form of pleading.[5] Indeed, it is never the *form,* but the substantive allegations, of the pleadings that determine the burden of proof,[6] and while in civil actions the burden of proof may be shifted in certain cases, yet in criminal cases this never occurs except when the respondent attempts to justify his crime.[7] Where the general issue is pleaded the onus is upon the plaintiff of proving every material allegation of the complaint. No evidence is properly admissible in behalf of the plaintiff which does not tend to support the averments of the complaint and the defendant is limited to evidence in disproof of such averments.[8]

during the progress of the trial. The weight of evidence, however, may change according to the necessities of the case in overcoming the evidence introduced by the opposite party. Rupp v. Sarpy County (Neb., 1905.), 102 N. W. 242.

[3] Veiths v. Hagge, 8 Iowa. 163; Kent v. White, 27 Ind. 390; Ford v. Simmons, 13 La. Ann. 397.

[4] Spaulding v. Harvey, 7 Ind. 429; Henderson v. State, 14 Texas, 403; Brandon v. Cabiness, 10 Ala. 155.

[5] State v. Melton, 3 Mo. 417.

[6] Loring v. Steinman, 1 Met. (Mass.) 204.

[7] Com. v. Dana, 2 Met. (Mass.) 329; Com. v. Kimball, 24 Pick. (Mass.) 336.

[8] Blankenship v. Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175.

As illustrative of the rule, if A. sues B. in an action for personal injuries received by him by reason of some act negligently done by B., the burden is upon A. to prove all the facts essential to show that B. was really guilty of negligence as charged by A. in his declaration; and B. is not required to put in negative proof unless these facts are legally established, that is, established by full proof of negligence, such as would render him liable for the results charged. When the proof of A. is all in, in those States in which a non-suit is permissible without the consent of the parties, the remedy is to move for a non-suit on the ground that the evidence fails to support the declaration; but in those States where the courts, by statute, are not permitted to non-suit the plaintiff, the remedy should be sought by moving for a verdict for the defendant upon the ground that the evidence is not sufficient to sustain the declaration. In a Massachusetts case, Loring v. Steinman, 1 Met. (Mass.) 204, the court expressly held that it was incumbent upon him who takes the affirmative of an issue, whether under

A defendant setting up matter in mitigation of damages, takes the burden of establishing fully the mitigating circumstances relied on;[9] so where matter in justification is plead,[10] or matter in avoidance,[11] or in bar.

If a party sets up matter in avoidance[12] or justification,[13] or special matters in defense, the burden rests upon him to establish

a declaration or plea, to maintain the issue raised by him by competent proof; and where the burden lies upon one party of proving an issue, he cannot change it or throw it upon the other party by any system of pleading. State v. Melton, 8 Mo. 417. Thus, in an action for the non-performance of a contract, the burden is upon the plaintiff to prove the non-performance by full proof, and failing in that, the defendant is entitled to a verdict. McGregory v. Prescott, 5 Cush. (Mass.) 67. So where a breach of the performance of a contract is alleged by a declaration or plea, the party setting it up is charged with the burden of proving it. Edmonds v. Edmonds, 1 Ala. 401.

[9] Murrell v. Whiting, 32 Ala. 54.

[10] Winans v. Winans, 19 N. J. 220.

[11] Gray v. Gardner, 17 Mass. 188; Brown v. Woodbury, 5 Ind. 254; Attleborough v. Middleborough, 10 Pick. (Mass.) 378; Jewett v. Davis, 6 N. H. 518.

Where a defendant, in an action on a promissory note by an indorser, denies that the note has been indorsed to the plaintiff before maturity, and therefore claims the benefit of any equities attaching in his favor against the payee, he takes the burden of proving the allegation, and the plaintiff is not bound to show when the indorsement was in fact made, the law, in the absence of proof, presuming that it was made before maturity. Hopkins v. Kent, 17 Md. 113; Davis v. Bartlett, 12 Ohio St. 534. The same is also true when the defendant sets up in his plea that the payee of the note is not the owner of the same, but has indorsed it to another who is the real owner, Vanbuskirk v. Levy, 3 Met. (Ky.) 133; so where want of consideration is alleged, the burden rests upon the defendant to establish it, the law presuming, where a consideration is expressed therein, that it was given for a full and valid consideration, until the contrary is proved; Gilbert v. Duncan, 29 N. J. L. 521; Quimby v. Morrill, 47 Me. 470; Thomas v. Quick, 5 Blackf. (Ind.) 334; Towsey v. Shook, 3 id. 267; so where the consideration is claimed to be illegal, Brigham v. Potter, 14 Gray (Mass.), 522; Trustees v. Hill, 12 Iowa, 462; Solomon v. Dreschler, 4 Minn. 278; Dykers v. Townsend, 24 N. Y. 57; Craig v. Proctor 6 R. I. 547; Kidder v. Norris, 18 N. H. 532; or usurious; Ives v. Farmers' Bank, 2 Allen (Mass.), 236; Engler v. Ellis, 16 Ind. 475; Hale v. Hazleton, 21 Wis. 320; and this must be by strict proof, and evidence is not admissible to prove that the party making the loan is a usurer, Jackson v. Smith, 7 Cow. (N. Y.) 717; so where a note is sued upon, purporting to be signed by an agent, the burden of proof is on the defendant to show want of authority. Thompson v. Abbott, 11 Iowa. 193.

When the holder of a note seeks to avoid want of protest and notice to the indorser, the burden is on him to establish the waiver of notice or other legal excuse or a promise to pay with full knowledge of his non-liability, Ballin v. Betske, 11 Iowa, 204; so the burden of establishing payment of a note or performance of an admitted contract is on the defendant. Caulfield v. Sanders, 17 Cal. 469; McKinney v. Slack, 15 N. J. L. 220; Edmonds v. Edmonds, 1 Ala. 401; Irwin v. Gernon, 18 La. Ann. 228; McLendon v. Hamblin, 34 Ala. 46; Buzzell v. Snell, 25 N. H. 474.

[12] Brown v. Woodbury, 5 Ind. 254; Attleborough v. Middleborough, 10 Pick. (Mass.) 378; Gray v. Gardner, 17 Mass. 188.

[13] Winans v. Winans, 19 N. J. Eq. 220; Treadwell v. Joseph, 1 Sum. (U. S.) 390.

the facts requisite to support his plea,[14] as want of consideration where a consideration is expressed in or implied from the contract,[15] usury[16] and other similar defenses. But the rule is otherwise as to pleas of the Statute of Frauds, limitations and defenses of that character,[17] and the plaintiff is bound to show facts which avoid the effect of the plea. Where the plaintiff shows a debt the burden is on the defendant to prove its payment even though the plaintiff may be obliged to allege a non-payment in his complaint.[18] Where the defendant interposes a counterclaim asking an affirmative judgment, he has the burden of proof,[19] and so of set off,[20] recoupment,[21] a plea to the jurisdiction,[22] or a plea of estoppel by judgment.[23] As in an action of tort for negligence, the defendant may under a general denial show the contributory negligence of the plaintiff, this is not an affirmative defense and the burden is on the plaintiff to show he was not negligent.[24] Where

[14] Great Western R. R. Co. v. Bacon, 30 Ill. 347; Vail v. McKernan, 21 Ind. 421; Pack v. Chapman, 16 La. An. 397; The Short Staple, 1 Gall. (U. S.) 104; The Argo, 1 id. 150.

[15] Pack v. Chapman, 16 La. An. 366.

[16] Hale v. Haselton, 21 Wis. 820.

[17] Taylor v. Spears, 6 Ark. 381.

[18] Melone v. Ruffino, 129 Cal. 514, 62 P. 93, 79 Am. St. Rep. 127; Perot v. Cooper, 17 Col. 80, 28 P. 391, 31 Am. St. Rep. 258; United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803.

[19] Liberty Wall Paper Co. v. Stover Wall Paper Mfg. Co., 178 N. Y. 219, 70 N. E. R. 501.

[20] Western Coal and Mining Co. v. Hollenbeck (Ark.), 80 S. W. 145.

[21] Truax v. Heartt, 135 Mich. 150, 97 N. W. 394.

[22] J. B. Pyron & Son v. Ruohs, 120 Ga. 1060, 48 S. E. 434.

[23] Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

[24] Mitchiver v. Western Union Telegraph Co. (S. C., 1905), 50 S. E. 190. *Contra*, in an action for negligence where the plaintiff has made out a *prima facie* case of negligence on the part of the defendant the burden then rests on the defendant to show contributory negligence in the plaintiff. Flannegan v. Chesapeake, etc., R. Co., 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. Rep. 896. In an action for negligence, where the plaintiff has disclosed facts conclusively showing contributory negligence on his part, he has made no case, and the defendant is entitled to a peremptory instruction at the close of the plaintiff's case. If, however, the facts disclosed by the plaintiff, while tending to show contributory negligence, are not so clear that different minds cannot well differ upon the proposition, then the defendant must produce his evidence. If he has pleaded contributory negligence as a defense, the burden is upon him to establish it. To controvert the evidence produced by the defendant, together with the facts tending to show contributory negligence which were shown by the plaintiff himself, the plaintiff must furnish sufficient evidence to overcome the weight of the defendant's evidence as well as that which was disclosed by him tending to show such negligence on his part. In doing this, however, the burden of proof does not shift. The only duty imposed upon the plaintiff in such case is to overcome the weight of evidence, which is then against him upon this point. It is immaterial whether the evidence was furnished partly by himself or all by the defendant; it is a part of the affirmative defense pleaded by defendant, and which the plaintiff must

the statute of limitations is pleaded as a defense the burden is upon the plaintiff to show that the action was commenced within the period limited by the statute.[25] Where a party in possession of land shows adverse possession for a period long enough to give him title as against the party holding the paper title the burden is upon the holder of the paper title to show himself under a disability during the period of adverse possession.[26] Where it appears that an agreement has been reduced to writing the party relying on it is bound to produce it or account for its absence, and the opposite party is under no obligation to call for it.[26a]

It may be said that in all cases the *onus probandi* rests upon the party who is obliged to free himself from liability by proving a fact, when the knowledge of that fact is supposed to be more within his reach than that of his adversary.[27] Where a party is seeking a recovery upon the ground that the defendant did not discharge a statutory duty, the burden is upon him to show that such duty was not discharged. Thus, where a statute provides that a railway company is required to ring the bell *or* blow the whistle of the locomotive within a certain distance of a highway crossing, a party seeking a recovery for an injury at a crossing upon the ground that this duty was not discharged, must show that neither the whistle was blown nor the bell rung as required by the statute; and if it is only shown that the whistle was not blown, no recovery can be had, because the company had its election to blow the whistle or ring the bell, and in the absence of proof to the contrary, if it is only shown that the whistle was not blown, it will be presumed that the bell was rung.[28]

As a restriction on marriage is exceptional the burden is upon the party claiming it to show it,[29] and the burden is on one contracting with an infant to show that the contract was fair and beneficial for the infant.[30] Where, in ejectment, the land in dis-

furnish sufficient evidence to balance or overcome. Rupp v. Sarpy County (Neb., 1905), 102 N. W. 242, 98 N. W. 1042.

[25] Houston v. Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

[26] Arnold v. Limeburger (Ga., 1905), 49 S. E. 812.

[26a] Mahoney v. Carr, 175 N. Y. 454, 67 N. E. R. 903.

[27] Forde v. Simmons, 13 La. An. 397.

[28] Cathcart v. Hannibal, etc., R. R. Co. (Mo. S. C., 1885), 11 Western Rep. 401.

[29] State v. Shattuck, 69 Vermont, 403, 38 A. 81, 60 Am. St. Rep. 936, where it was claimed that one against whom a divorce had been granted in another State was thereby under a disability to marry again.

[30] Johnson v. Northwestern Mut. L. I. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 45 Am. St. Rep. 473.

pute is within the boundaries of a deed and the defendant claims under exceptions in such deed the burden is upon the defendant to prove himself within the exceptions.[31] Where an undisclosed principal brings suit on a contract made by his agent the burden of proof lies on the principal to show the agency and that in the making of the contract the agent was acting for him.[32] Where one is sued for conversion and admits the taking, but claims it was by his agent and under the license of a statute, the burden is on the defendant as a matter of order of proof, to go forward and prove the license. There is no presumption, as in case of government officials, that the agent, having authority to act, acted within the scope of his authority.[33]

In assumpsit, account or actions of book account to recover a balance due upon accounts, the burden rests upon the plaintiff to establish the accuracy of his accounts, and the fact that the articles charged were delivered to the defendant. In some of the States, the books of account are held to be *prima facie* evidence of the sale, delivery, etc., but in others, if the person making the charge is still living, he must be produced as a witness, or the fact of delivery established by other evidence.[34] In the case of merchants' accounts, if a statement has been sent to the defendant, and he did not object thereto within a reasonable time, it is presumed to be correct,[35] and such also is held to be the rule as to accounts current, or accounts in the ordinary course of business.[36] If accounts have been settled and a balance agreed upon, if a mistake is claimed to have been made, the burden of proof is on the party seeking to open the account;[37] but when a party claims that accounts have been liquidated, the burden is upon him to establish it. Thus where to a plea of the Statute of Limitations the plaintiff replied that the accounts were merchants' accounts, and the defendant rejoined that the accounts were not open and current, but were liquidated more than six years before the action was brought, the plaintiff

[31] Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725.

[32] Powell v. Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915.

[33] United States v. Denver & R. G. R. R., 191 U. S. 84, 24 S. Ct. 33.

[34] See *ante*, § 128.

[35] Bainbridge v. Wilcocks, Bald. (U. S. C. C.) 536; White v. Mason, 3 Cranch (U. S. C. C.), 250; Hopkirk v. Page, 2 Brock. (U. S. C. C.) 20; Barry v. Barry, 3 Cranch (U. S. C. C.), 120; Wiggins v. Burkham, 10 Wall. (U. S.) 129.

[36] Webbe v. Chambers, 3 Ired. (N. Co.) L. 374; Sheppard v. Bank of Missouri, 15 Mo. 143; Freeland v. Heron, 7 Cranch. 147.

[37] Mills v. Johnston, 23 Tex. 308.

traversed this plea. It was held that the burden of proof was upon the defendant to show that the accounts were liquidated and closed.[38]

If a party seeks to recover of another upon a contract made by another in his name as agent, the burden is upon him to establish the agency. Thus where a person sold goods to another whom he alleged to be the agent of a quartermaster, and the allegation was traversed, it was held that the burden was upon the plaintiff not only to establish the agency, but also the appointment of the quartermaster.[39] The fact of agency may be established by proof that a certain person acted as such for the defendant with the defendant's knowledge, or under such circumstances that he may be presumed to have known of it.[40] But where the defense to an action is that the contract was made by the defendant as agent, the burden is upon him not only to establish that fact, but also that he was, in fact, agent for the person against whom he claims the liability exists, and that he had full authority to make the contract for him.[41]

Where an altered instrument is offered in evidence the burden is always upon the proponent to prove its execution as claimed.[42]

[38] M'Lellan v. Crofton, 6 Me. 308.

[39] Calkins v. United States, 1 Ct. of Cl. 382. See, also, Beals v. Merriam, 11 Met. (Mass.) 470.

[40] State v. Foster, 23 N. H. 348.

[41] Oawter v. Baker, 23 Ind. 63; Wheeler v. Reed, 36 Ill. 81.

[42] The addition in manuscript of a single letter to a typewritten instrument does not preclude its being read in evidence. When the execution of the instrument is proved the burden does not change, but the defendant meets the evidence of the plaintiff by proof that the contract in evidence is not that put in suit and the burden remains on the plaintiff to prove the contract on which he has declared. Graham v. Middleby, 185 Mass. 349, 70 N. E. R. 416. Where a contract contains an interlineation it will usually be admitted on testimony that the interlineation was made before execution, but when the fact is controverted the burden is still upon the party having possession of the instrument and claiming under it to satisfy the jury by a preponderance of evidence that the alterations were made under such circumstances as not to affect his right to recover. Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 S. E. 879. Where an instrument is produced with the signature crossed out the burden is upon the party relying upon it to show that the signature is still upon it or was upon it when delivered and has not since been cancelled with the consent of the party claiming under it. Baxter v. Camp, 71 Conn. 245, 41 A. 803, 71 Am. St. Rep. 169. Where a note has been altered the question, whether the alteration was before or after delivery is a matter of proof like any other fact and the burden is upon him who claims that the note was altered before delivery. Wolferman v. Bell, 6 Wash. 84, 32 P. 1017, 36 Am. St. Rep. 126. An alteration in a note, mortgage or other written contract or evidence of indebtedness must be explained by the person benefited by the alteration, as the law presumes, in the absence of proof

However, where an interlineation in a deed is in the same handwriting as the body of the deed, and accords with the purpose and object of the deed the fair presumption is that it was made before the acknowledgment of execution,[43] but not where the alteration is suspicious on its face. However where the boundaries of a tract conveyed are altered to include additional land and the clause specifying the number of acres conveyed is not changed to correspond, the alteration must in the absence of explanatory proof be held to be made after the deed was executed and to be ineffective as lacking the proper attestation, even though made by the grantor.[44] Where a substantial compliance with the provisions of the statute as to preservation of ballots has been shown, the burden of proof shifts of establishing that they have in fact been tampered with.[45]

to the contrary, that the original contract without alteration expresses the real intention of the parties. Van Horn v. Bell, 11 Iowa, 465; Hill v. Cooley, 46 Penn. St. 256; Smith v. United States, 2 Wall. (U. S.) 219.

[43] Lewis v. Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82. In Louisiana the burden of proof is on him who would show that an erasure in a material part of a deed was made before signing. Wheadon v. Turregano, 112 La. —, 36, So. 808.

[44] Burgess v. Blake, 128 Ala. 105, 28 So. 963. Where there is a conflict between a probate dead as altered and the description of the land as given in the probate proceedings which are the foundation of the deed, the deed should be excluded. Collins v. Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

[45] Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 P. 454.

Where an original entry of an account was altered, it was held that the alteration must be explained or it would be presumed to be in accordance with the facts at the time of entry. Shiels v. West, 17 Cal. 324; but if the alteration is not apparent, the person claiming the benefit of it must prove it fully, Davis v. Jenny, 1 Met. (Mass.) 221; so where a mortgage was altered, it was held in the absence of proof to the contrary that the burden was on the mortgagee to explain the alteration, and that in the absence of proof to show that the alteration was in accordance with the contract, it would be presumed that the contract was as it existed before the alteration was made, Van Horn v. Bell, 11 Iowa, 465; and as to whether a material alteration requiring explanation has really been made since the delivery of the contract, the court may determine. Wood v. Steel, 6 Wall. (U. S.) 80; Ives v. Farmers' Bank, 2 Allen (Mass.), 236. Where an official document, which has always remained in the custody of the officer entitled to its charge, is altered, it will be presumed, until the contrary appears, that the alteration was rightly made. Devoy v. New York, 35 Barb. (N. Y.) 264. Where, previous to the inspection by the jury of a locality where a crime has been committed, a change has been made, it is incumbent upon the prosecution to show that the change does not injuriously affect the respondent. State v. Knapp, 45 N. H. 148. When a party who has formerly resided for a long time in one locality goes to reside in another for such a time as raises a reasonable presumption of actual residence, the burden is upon him to show that his domicile is still at the place in which he has formerly resided. Atler v. Waddell, 20 La. Ann. 246. See Hart v. Horn, 4 Kan. 232, where it is held that *fact* and

Where a lien has once attached in favor of a vendor, it is incumbent upon a purchaser who claims that the lien has been quieted or lost to maintain the fact.[46] When a person seeks to recover of a carrier for injuries received by his or its neglect, the law presumes that he was a passenger for hire, and the burden of establishing the contrary is on the carrier;[47] so in an action against a carrier of goods it is not incumbent on the plaintiff to show negligence on the part of the carrier, but the burden is on the carrier to show that the goods were not delivered by reason of the intervention of a legal excuse.[48] The rule is that it is only incumbent upon the plaintiff to show a delivery of the goods to the carrier and their loss, or if the claim is for damages done to them, the fact that they are damaged and the amount of the injury, and the *onus* is then imposed upon the carrier of showing that the loss or damage resulted from some of the perils from which they are exempted under their contract of shipment;[49] but in actions against common carriers of passengers, the mere fact that a passenger was injured while on his journey is not sufficient to throw the *onus* of proving due care on the carrier. The burden is on the party injured to make out that degree of negligence and want of care on the part of the carrier essential to charge him with liability, and he cannot rest his case until such proof is made; as, failing in that, the carrier is entitled to a verdict without the introduction of any proof whatever.[50]

Sec. 183. Fraud.

In all cases where fraud is charged as substantive matter, whether in a declaration or plea, the party alleging it must make it out by a clear preponderance of evidence.[1] Thus where fraud is charged in the administration of a trust, the party relying upon it takes the burden of establishing the fraud, and the evidence must

intent must concur to work a change of domicile. See, also, Clarke v. Territory, 1 Wash. Ter. 82.

[46] Hays v. Horine, 12 Iowa, 61.

[47] Buffit v. Troy, etc., R. R. Co., 36 Barb. (N. Y.) 420.

[48] Tarbox v. Eastern Steamboat Co., 50 Me. 339.

[49] Hinkle v. Southern Ry. Co., 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; Shaw v. Gardner, 12 Gray (Mass.), 488; Steamer Niagara v. Cordes, 21 How. (U. S.) 70; Ill. R. R. Co. v. Cowles, 32 Ill. 116; Humphreys v. Switzer, 11 La. Ann. 320; Tarbox v. Eastern Steamboat Co., 50 Me. 339.

[50] Mitchell v. Western, etc., Railroad Co., 30 Ga. 22.

[1] Beatty v. Fischel, 100 Mass. 448; Kline v. Horine, 47 Ill. 430; Hager v. Thomson, 1 Black (U. S.), 80; Oaks v. Harrison, 24 Iowa, 179; Winslow v. Gilbert, 50 Me. 90; Blaisdell v. Cowell, 15 Me. 370.

be such as to overcome the presumption of a correct administration of the trust which the law raises in favor of the trustee,[2] and in an action to have the probate of a will set aside the burden is upon the plaintiff to prove undue influence on the testator;[3] so, too, where fraud is charged in a contract, all the elements necessary to establish the fraud must be made out by the party alleging it;[4] as where false representations in the sale of property are relied on, it must not only be proved that the representations were false, but that they were made with a *fraudulent* intent and in respect to a material matter;[5] mere expressions of opinion by the vendor of property, real or personal, whether relating to its quality or quantity, even though such representations are erroneous and untrue, are not sufficient in the absence of improper motive to establish fraud either in support of an action at law or for relief in equity. The representations, in order to be actionable or relievable in equity, must have been in reference to a substantive matter, must have been relied on by the purchaser and made under such circumstances as to show a fraudulent purpose on the part of the vendor, and the burden of establishing all these facts is upon him who would avail himself of them;[6] as that the facts claimed to be false were peculiarly within the vendor's knowledge;[7] or that he made the representations as matter of *knowledge* and not of belief, the fraud consisting in setting up his mere belief as knowledge;[8] so in an action where the material question is, whether a party selling property with certain defects under such circumstances that fraud is predicted of the act, it is incumbent on the party alleging the fraud to prove that the other *did not* disclose the defects;[9] and indeed in all cases where the presumptions are with the defendant, the burden is on the plaintiff to fully overcome them. Thus, in all cases where fraud is alleged and relied on, the *onus* is on the plaintiff to prove it fully and by strict proof, even though it in-

[2] Bibb v. Pope, 43 Ala. 190.

[3] Parker v. Lambertz (Iowa, 1905), 104 N. W. 452.

[4] Smith v. Webb, 64 N. C. 541.

[5] Taylor v. Scoville, 54 Barb. (N. Y.) 34.

[6] Moore v. Barre, 11 Iowa, 198; Drake v. Latham, 50 Ill. 270; Curry v. Keyser, 30 Ind. 214; Putney v. Handy, 99 Mass. 5; Wheeler v. Randall, 48 Ill. 182; Marshall v. Gray, 39 How. Pr. (N. Y.) 172; Hagee v. Grossman, 31 Ind. 223.

[7] Sinerking v. Litzler, 31 Ind. 13; Paddock v. Fletcher, 42 Vt. 389; Morgan v. Skidmore, 55 Barb. (N. Y.) 263; Bradbury v. Bordin, 35 Conn. 577; Fackler v. Ford, McMahon (Kan.). 21.

[8] Cabot v. Christie, 42 Vt. 121; Paddock v. Fletcher, id. 389.

[9] Flemming v. Slocum, 18 Johns. (N. Y.) 403.

volves negative proof because fraud is never presumed, but rather the opposite.[10] But where facts are proved pointing toward fraud or undue influence the burden then shifts and rests upon the parties charged with the fraud to explain these circumstances and when they fail to furnish evidence clearly within their power all the presumptions of law are against them.[11]

Sec. 184. Burden as to Negative Propositions.

The party holding the affirmative of the issue, as a *general* rule, takes the *onus* of proof, but there are numerous exceptions to this rule, and it may be stated as a general proposition *that in all in-*

[10] Norris' Peake on Ev., p. 7.

So where an action is brought for official misconduct or neglect, the presumption being that all officers discharge their duty, it is incumbent on the plaintiff to overcome this presumption by full proof and to take the burden of proof, whether the issue is affirmative or negative; as where a sheriff is charged with neglect in the service of process, Buler v. Bullitt, 3 Marsh. (Ky.) 280, or in the levy of an execution, it is always incumbent on the plaintiff to establish the neglect by showing that the officer did not discharge his duty, Davis v. Johnson, 3 Munf. (Va.) 81; and so in a multitude of instances too numerous for special mention here, and, indeed, in all instances where the right of action or the validity of the defense depends upon proving that a certain act was *not* done, the party alleging it, whether plaintiff or defendant, takes the *onus* of proof. As illustrative of this, where a levy of an execution is sought to be avoided upon the ground that the sheriff has failed to give the notice required by law, the law raising a presumption in favor of the sheriff that he has performed his duty in a legal manner, the burden is upon the party attacking the levy, not only to overcome this presumption by strict proof, but to overcome by a fair preponderance of evidence all proof interposed tending to establish the presumption and to show that the notice was not given, Hartwell v. Root, 19 Johns. (N. Y.) 345; Topper v. Taylor, 6 S. & R. (Penn.) 173; so in settlement cases where a pauper is sought to be charged upon another town or county, it is always incumbent upon the town or county seeking to charge the other with the pauper's support to show that the pauper has no settlement in it, Wilmington v. Burlington, 4 Pick. (Mass.) 174; so in actions for malicious prosecutions, want of probable cause must be fully made out by the plaintiff, Lane v. Crombie, 12 Pick. (Mass.) 177; Purcell v. McNamara, 9 East, 361; so in criminal proceedings, while the burden is upon the State of establishing not only affirmative, but also negative matter, such as the absence of provocation or that the act was not done in self-defense, in trials for murder; yet, as to all matters not connected with the body of the offense charged, and which are in defense purely, the burden is on the respondent. In a Vermont case, State v. Patterson, 45 Vt. 308, the court very ably discussed the rule applicable to trials for murder as to the burden of proof in cases where there were any really exculpatory circumstances, and held that in all such cases the burden is upon the State to make out all the elements necessary to establish the principal offense, even to the extent of overcoming the force of such exculpatory circumstances. State v. Lipscomb, 52 Mo. 32; State v. Murphy, 33 Iowa, 270.

[11] Nunez v. Bayhi, 52 La. Ann. 1719, 28 So. 349.

stances where the right of action depends upon a negative averment, the party making it is charged with the burden of proving it. This is in obedience to the rule that the burden of proof is upon him who raises an issue which would be defeated if no proof was offered.[1] The rule operates no hardship, for the reason that a party whose right of action depends upon proof that a person has not done an act which he was legally bound to do, and the neglect to do which creates a legal liability in his favor, is presumed to be prepared with proof that the act has not been done, and without such proof the bringing of an action is wholly unwarranted. There are a multitude of instances, however, where only slight proof of the affirmative of the issue is necessary to throw the burden of proving the negative upon the defendant. These are instances where the law presumes the affirmative of the issue. Thus, in an action on a promissory note, the mere production of the note, where its execution is not denied, is sufficient to establish the plaintiff's right of action, the law presuming non-payment from the fact of possession; and if the defendant sets up payment, the burden is upon him, and this is the case in all actions upon written evidence of indebtedness where the amount is liquidated. But in actions upon book debt, the rule is different. In such cases, unless a settlement has been had, and the amount due liquidated under the hands of the parties, the plaintiff is not only compelled to prove his account, but, also, that it has not been paid; so in an action upon a bond, the mere production of the bond is not sufficient; the plaintiff is also bound to prove that the defendant has not complied with its provisions, and if there are any precedent acts to be performed by him, that he has on his part fully performed, before the burden is shifted to the defendant. There are exceptions to the general rule that he who takes the affirmative of an issue takes the burden of proof, as where the declaration or plea sets up negative matter, essential to the issue, which is peculiarly within the knowledge of the other party. In such cases the allegations are taken as true unless denied by the other party.[2] One objecting to the certificate of an administrative officer for want of an official seal has the burden of proving that the officer had a seal.[3] Thus, in actions for a

[1] Kent v. White, 27 Ind. 390.

[2] State v. Crowell, 15 Me. 171; Haskill v. Com., 3 B. Monr. (Ky.) 342; Schleisinger v. Hexter, 34 N. Y. Superior Ct. 499; Ryan v. Valandingham, 25 Ill. 128.

[3] Anglo-American, etc., Co. v. Dyer, 181 Mass. 593, 64 N. E. R. 416.

penalty for selling articles without a license, the fact that the party has a license being peculiarly within the knowledge of the defendant and susceptible of easy proof by him, the burden is upon him to show that he has complied with the law, and has a license to sell.[4] Indeed, it may be given as the general rule that *in all cases where the nature of the allegations is such as to show that the defendant is peculiarly possessed of the knowledge to disprove the issue, the law presumes the truth of the negative allegations, and the burden is upon the defendant to disprove them. But the rule never attaches except in instances where the law presumes the truth of the allegation until the contrary is shown.*[5]

[4] Wheat v. State, 6 Mo. 455.

[5] Genig v. State, 1 McCord (S. C.), 573; Com. v. Kimball, 7 Met. (Mass.) 304; Sheldon v. Clark, 1 Johns. (N. Y.) 513; Smith v. Jeffries, 9 Price, 257.

In an indictment for keeping a ferry without a license, it was held that the burden is upon the defendant to show that he had a license, and that the prosecution were not obliged to introduce any evidence upon that point. Wheat v. State, 6 Mo. 455; but in cases where the knowledge is equally accessible to both parties, so that it cannot be said to be peculiarly in the defendant, the rule is otherwise. Thus, it has been held that where licenses granted were a matter of record in a public office, and must be there recorded in order to have validity, the State is bound to show that no license was granted to the defendant. Where a person makes a will while under guardianship as *non compos mentis*, the burden is upon the executor to show both that the testator had such mental capacity and freedom of will and action as are requisite to make a legal and valid will, Breed v. Pratt, 18 Pick. (Mass.) 115; but where the insanity of the testator is set up in avoidance of the will, the party alleging it must prove it, as the law presumes the opposite. Barton v. Scott, 3 Rand. (Va.) 399; Phelps v. Hartwell, 1 Mass. 71; Hubbard v. Hubbard, 6 Mass. 397.

In an action for a breach of covenant in not supplying timber according to the terms of the contract, where the defense was that the plaintiff did not furnish money, it was held that the *onus probandi* was upon the defendant, but that a verdict ought not to be rendered against the defendant if the proof was such that the jury had reasonable doubts as to the facts, Hollister v. Bender, 1 Hill (N. Y.), 150; so in an action by an assignee under insolvent or bankrupt laws, to recover the value of property transferred by the bankrupt to one of his creditors, it is incumbent on the plaintiff to prove that the defendant had reasonable grounds to believe that the bankrupt was insolvent when the transfer was made. Butler v. Breck, 7 Met. (Mass.) 164. Merely alleging a fact, without producing any evidence to support it, can in no case throw the burden upon another party of disproving it, Kyler v. Calmes, 1 How. (Miss.) 121; as an allegation that a note sued upon is without consideration. Kyler v. Calmes, *ante*.

The date of the assignment of a note is *prima facie* evidence of the time when it was assigned. Byrd v. Tucker, 3 Pike (Ark.), 451. Where a party has once acquired a domicile in a town, and is there taxed, in a suit for the same, the burden is upon him to show that he had really abandoned his domicile there, before the tax is assessed, Kilburn v. Bennett, 3 Met. (Mass.) 199; so in an action between two towns for the support of a married woman who is a pauper, the burden is on the plaintiff town to show that she has a settlement in the defendant town, and if

Sec. 185. Presumption of Innocence, etc.

The law presumes every person to be innocent until he is proved to be guilty of a crime, and this presumption is so strong that the prosecution must, before it rests its case, make out the person's guilt by such evidence as leaves no reasonable doubt, or he will be entitled to an acquittal without the introduction of any rebutting proof;[1] and where the evidence is circumstantial, the rule is that the jury, in order to convict the prisoner, must find the circumstances clearly proved *as facts,* and when they are so found, they must be of such force and character as clearly and unequivocally imply the prisoner's guilt, and not consistent with any reasonable hypothesis of his innocence. If they can be reasonably reconciled with any hypothesis of his innocence, he is entitled to the benefit of that hypothesis, and it would be error for a jury to convict.[2] Indeed, so strong is this presumption of innocence

the defendant town seeks to avoid liability upon the ground that her husband had a settlement in some other town, the burden of proving this is on the defendant, the rule being that a person seeking to avoid liability by setting up new matter takes the burden of proof as to such matter, Randolph v. Easton, 23 Pick. (Mass.) 242; so where, in an action between two towns for the settlement of a pauper, the defendant admits that the pauper once had a residence in it, but claims that he has since gained a residence in the plaintiff town, the burden is on the defendant to establish the issue, Kilburn v. Bennett, 3 Met. (Mass.) 199; so in a case where the seizin of the party at a given time is admitted or proved, the legal presumption is that it continues, and one who sets up a disseizin takes the burden of proof of overcoming the presumption and establishing a disseizin by *full* proof. Brown v. King, 5 Met. (Mass.) 173.

Where, in an action of ejectment, the plaintiff claims to recover by reason of the breach of a condition subsequent, he is bound to prove the breach, even though a negative. O'Brien v. Doe, 6 Ala. 787. Where either party claims under a document signed by a public agent, the signature must be proved, whether denied or not. Yo-nee-gus-kee v. Coleman, 3 Hawks (N. C.), 174. So, in a *qui tam* action against a clerk for issuing a license to marry a female under age, the plaintiff is not bound to prove that consent was not given; the record of the fact being *prima facie* evidence of it, and in the custody of the clerk, he is bound to produce it if he justifies under it, Blaun v. Beal, 5 Ala. 357; so in a *qui tam* action against a minister for marrying a minor the burden of proving the parents' consent is on him. Medlock v. Brown, 4 Mo. 379. In a trial for a criminal offense, the prosecution is bound to prove actual guilt even to the extent of negativing facts that would exclude it. Thus in a New York case, People v. Bodine, 1 Denio (N. Y.), 281, it was held that proof by the State that a murder had been committed, and that the house in which the body was found was set on fire, under circumstances that warranted a suspicion that it was fired by the perpetrator, was not enough to show that the respondent *might* have been at the scene of the fire to change the *onus* of proof upon the respondent to account for his presence, but that it must show that he was *in fact* there.

[1] United States v. Gooding, 12 Wheat. (U. S.) 460.

[2] United States v. Douglass, 2 Blatchf. (U. S.) 207; Ogletree v.

and honesty of purpose on the part of every member of society, it is held that in a civil action where the facts of a case present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the courts will, unless the weight of evidence is decidedly in favor of the hypothesis of dishonesty, strike the balance in favor of innocence and honesty of purpose.[3] The rule does not go to the extent of excluding *any* doubt as to the prisoner's guilt, but is confined to *reasonable* doubts—such doubts as lead a juror to hesitate about convicting the prisoner, as do not leave the mind satisfied that a verdict of guilty should be rendered, and such as would lead a reasonable man to hesitate about acting against it in the ordinary relations of life. It is not a question whether the jury *must believe* in his guilt, but whether, while the mind inclines to the prisoner's guilt, there is yet such a doubt remaining in his mind as leads him to hesitate about convicting him; whether there is any reasonable hypothesis in view of all the evidence consistent with the prisoner's innocence. If so, the prisoner is entitled to the benefit of the doubt, as the prosecution has failed to maintain the issue raised by it by full proof, which requires to show the prisoner's connection with the crime beyond a reasonable doubt.

Sec. 186. Burden in Case of Lost Notes, Etc.

As to the burden of proof in the case of lost notes or evidences of indebtedness, the rule is, that where the instrument is admitted once to have existed, the creditor is merely bound to prove its loss, and the burden is upon the defendant to prove payment or satisfaction of the claim.[4]

But the loss must be clearly proved, otherwise all the presumptions as to its contents will be against the holder.[5]

In the case of an instrument mutilated or destroyed by a person who is a party to it, everything which can be, will be presumed against him when it is offered in evidence, and the burden

State, 28 Ala. 693; State v. Newman, 7 id. 69; Com. v. Kimball, 24 Pick. (Mass.) 366; Com. v. Dana, 2 Met. (Mass.) 329.

[3] Greenwood v. Lowe, 7 La. Ann. 197.

[4] Bell v. Young, 1 Grant (Penn.), 175; so in McIlroy v. Cochran, 3 Litt. (Ky.) 454, it was held that where the loss of a note is alleged and it is admitted by the defendant that such a note once existed, a legal consideration is presumed, and the holder will not be compelled to substantiate the original transaction or show its nonpayment.

[5] Little v. Marsh, 2 Ired. (N. C.) 331.

will be upon him to explain the mutilation or destruction, and the exact legal character and effect of the instrument originally.[6]

Sec. 187. Who is to Begin.

It frequently becomes an important question whether under the pleadings, the plaintiff or the defendant shall open the facts and evidence to the jury. The right to begin often confers a great advantage upon a party, and is a right which is generally claimed, as where evidence is anticipated on the opposite side which will give a right to reply generally on the whole case; or in some instances it may be a disadvantage, as where the party relies upon the witnesses of his opponent, or upon the difficulty of the proofs incumbent upon him.

As a rule, the right to begin depends upon the nature of the issue and the rules relating to the burden of proof at the opening of the trial, but the real test is not on which side the affirmative rests, but *which side will be entitled to a verdict if no evidence is given,*[1] which is really nothing more than a new way of stating the rule that the party upon whom the burden of proof lies must begin, because until this question is settled it cannot be determined who would be entitled to the verdict if no proof was given. In determining this question, however, regard is to be had to the effect and substance of the issue, rather than to its grammatical form.[2] Thus, in an action for the breach of a contract by executing it in an unworkmanlike manner, where the defendant pleads that it was executed in a workmanlike manner, the plaintiff must begin, because if no evidence was given the verdict must be against him, because the law will not assume that the work was bad.[3] So in an action by an indorser against an acceptor, if the defendant pleads that the bill was for the drawer's accommodation, and that the plaintiff did not give any consideration to the drawer, to which the plaintiff replies that it was indorsed to him by the drawer for a good consideration, as a consideration is presumed, the defendant must begin by proving the want of it, or some suspicious circumstances to throw the proof on the plaintiff.[4] In a declaration upon a pol-

[6] Kent v. Bottoms, 3 Jones (N. C.), 78; Haleyburton v. Kershaw, 3 Des. (S. C.) 105; Henderson v. Hake, 1 D. & B. (N. C.) 119.

[1] Leete v. Gresham Ins. Co., 15 Jur. 1161.

[2] Amos v. Hughes, 1 M. & R. 464; Lamand v. Leggett, 7 C. & P. 615.

[3] Amos v. Hughes, *ante.*

[4] Mills v. Barber, 1 M. & W. 425; Lewis v. Parker, 4 Ad. & E. 838.

icy of life insurance, the plaintiff averred that the deceased had led a temperate life, which was denied by the plea. It was held that the *onus probandi,* and therefore the right to begin, was with the plaintiff, as he was bound to give some evidence that the life was insurable; though it was contended that intemperance was not to be presumed.[5] And the same rule has been adopted where the issue was raised on a plea respecting the health of the insured;[6] although in the last case the plea, alleging a specific complaint, ended with a verification. Where an issue on the sanity of a person was directed by chancery, the court presumed that the person ordered to be plaintiff was to begin.[7]

So, generally if the affirmative of the issue lies on the defendant, and the plaintiff does not seek to recover *unascertained* damages, the defendant's counsel begins (after the pleadings have been opened by the plaintiff), and has the general reply.[8] Thus, where the defendant, a constable, being sued in trespass pleaded a justification without the general issue, it was held that his counsel, admitting a demand of a copy and perusal of the warrant and the damages claimed, was entitled to begin.[9] To trespass *quare clausum* the defendant pleaded a right to a watercourse and entry to remove obstructions, the plaintiff traversed the right. It was held that the judge might properly allow the defendant to begin, *unless the plaintiff undertook to prove substantial damage.*[10] So where a defendant in replevin pleads property in a third person and not in the plaintiff, to which the plaintiff replies that the property is not in such third person, but in himself, the defendant is entitled to begin.[11] And where, to an action of covenant for repayment of money, the defendant pleaded that the deed was given to secure money lost by gambling, it was held that the defendant was entitled to begin.[12]

But where by order of court the defendant is under an obligation to admit the plaintiff's case, this does not necessarily deprive the plaintiff of his right to begin.[13] Nor does the admission by

[5] Huckman v. Fernie, 3 M. & W. 505; Rawlins v. Desborough, 2 M. & R. 70.

[6] Geech v. Ingall, 14 M. & W. 95; Ashby v. Bates, 15 M. & W. 589.

[7] Frank v. Frank, 2 M. & R. 314.

[8] Cotton v. James, M. & M. 275; Jackson v. Hesketh, 2 Stark. 518; Pearson v. Coles, 1 M. & R. 206.

[9] Burrell v. Nicholson, 1 M. & R. 305.

[10] Chapman v. Rawson, 8 Q. B. 673.

[11] Colstone v. Hiscolbs, 1 M. & R. 301.

[12] Hill v. Fox, 1 F. & F. 136.

[13] Thwaites v. Sainsbury, 5 C. & P. 69.

the defendant's counsel of all the facts, the proof of which are on the plaintiff, give the defendant the right to begin, *where the admission of these facts might have been made in pleading.*[14]

In many cases where damages, and not the decision of a mere right, have been the object of an action, defendants so used to plead as to take an affirmative issue on themselves, and thereby attempt to exclude the plaintiff's right to a general reply. The judges, however, came to a resolution that "in actions for libel, slander and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant." The resolution, however, is not to be taken as confined to those actions, or introducing a new practice, but as a declaratory of a principle applicable to other actions.[15] The general rule, therefore, as laid down in this case is, that *wherever the record shows that something, even damages only, is to be proved by the plaintiff, he ought to begin, whether the action be in contract or tort.* Where the damages are of *ascertained amount* or *must be nominal,* then the defendant may begin if the pleading will admit of it.[16]

The plaintiff need not in any action prove the amount of damage he alleges he has sustained, unless the defendant either deny or state that he does not admit the same. Hence, where the defense contains no such denial or statement, and is affirmative only, the defendant will be entitled to begin.[17] Where the affirmative of any one material issue is on the plaintiff, and he undertakes to

[14] Pontifex v. Jolly, 9 C. & P. 202, Price v. Seaward, C. & M. 23.

[15] Mercer v. Whall, 5 Q. B. 447, 462.

[16] Mercer v. Whall, *ante.*

Thus, in the case last cited, in covenant for dismissing a clerk, the defendant pleaded misconduct, and plaintiff replied *de injuria, etc.* It was held that plaintiff ought to begin. So in an action on a promissory note, to which defendant pleads *inter alia,* payment into court, and issue is joined as to damages *ultra,* the plaintiff is to begin, though other issues lie on the defendant. Booth v. Millns, 15 M. & W. 669. On a note by the defendant, to which she pleads coverture when she made it, on which issue is joined, the defendant is to begin, although the plaintiff seeks to recover interest not mentioned on the note. Cannam v. Farmer, 3 Exch. 698. In trespass, where the defendant pleaded a custom to divert water, which was traversed by the plaintiff, the defendant was allowed to begin, though the plaintiff's counsel asserted his intention to ask for heavy damages. Bastard v. Smith, 2 M. & R. 129. In the case last cited TINDAL, C. J., said: "The plaintiff might have traversed the custom and new assigned excess, and then would have had a right to begin."

[17] Lacon v. Higgins, 3 Stark. 178; Morris v. Lotan, 1 M. & R. 233; Bonfield v. Smith, 2 M. & R. 519; 3 C. & P. 463; Woodgate v. Potts, 2 C. & K. 258; Tindall v. Basket, 2 F. & F. 644, and 1 Taylor Evid., § 355.

give evidence upon it, he has a right to begin as to all;[18] and it seems that judgment by default as to part has the same effect, though the defendant pleads affirmatively as to the residue.[19] But where, to an action on a bill and on an account stated, the defendant pleaded payment to the first and non-assumpsit to the second count, it was held that the plaintiff had no right to begin unless his counsel undertook to give some evidence of the account stated besides the bill.[20] The plaintiff in replevin has the same right as in other actions, though both parties are actors.[21]

Sec. 188. Who Begins in Action to Recover Lands.

In ejectment the defendant may, in some cases, by admitting a title in the plaintiff, entitle himself to begin, and the same principles apply to an action for the recovery of land by a remedy substituted for ejectment, notwithstanding the use of pleadings therein. Thus, where the plaintiff claims as heir-at-law, and the defendant as devisee, it is a settled rule that the defendant, by admitting the plaintiff's pedigree and the dying seised, may entitle himself to begin and to reply.[1]

[18] Rawlins v. Desborough, 2 M. & R. 328; Collier v. Clark, 5 Q. B. 467.

[19] Wood v. Pringle, 1 M. & R. 277.

[20] Smart v. Raynor, 6 C. & P. 721; Mills v. Oddy, 6 id. 728; overruling Homan v. Thompson, 6 id. 717; Frith v. McIntyre, 7 C. & P. 44; Oakeley v. Ooddeen, 2 W & F. 656.

[21] Curtis v. Wheeler, M. & M. 493.

[1] Revett v. Braham, 4 T. R. 497; Fenn v. Johnson; Adam's Eject. (2d ed.) 256, and Mercer v. Whall, 5 Q. B. 464.

And the same principle applies, although one of the plaintiffs had, since the death of the testator, become assignee of an outstanding term in part of the land; for "the real question in dispute is the validity of the will." Smith v. Smart, 1 M. & R. 476. For the same reason, where the plaintiff claimed as heir of C. and as devisee and heir of R., who was C.'s heir, and the defendant claimed as devisee of C., the defendant's counsel was permitted to begin on admitting that plaintiff was heir of C. and of R., and entitled to recover, *unless* defendant proved C.'s will. Wollaston v. Barnes, 1 M. & R. 386. Where the plaintiff claims as devisee of A., and the defendant as devisee under a subsequent will of A., the defendant cannot, by admitting the seisin of A. and the *prima facie* title of the plaintiff, entitle himself to begin. Wollaston v. Barnes, overruling Corbett v. Corbett, 3 Camp. 368. Generally, in order to entitle the defendant to begin by admitting the plaintiff's case, he must admit the *whole* without qualification. Pill v. Wilson, 1 M. & R. 232. Therefore, where the plaintiff claims as the heir of A., and defendant under a conveyance by A. in his lifetime, the latter cannot deprive the plaintiff of the right to begin by only admitting the heirship of the plaintiff and seisin of A. *unless* defeated by the conveyance, Tucker v. Tucker, M. & M. 536, for it is part of the plaintiff's case that A. died seized. So where each party claimed as heir, and defendant admitted that plaintiff was entitled as heir *if* defendant was not legitimate; held, that he could not by so doing obtain a right to begin. Warren v. Bray, M. & M. 166.

An erroneous ruling of the court as to who is to begin, will not necessarily entitle the party to a new trial,[2] but if the error is clear and an undue advantage may have been given to the successful party, it is ground for a new trial.[3]

Sec. 189. Right to Reply.

Generally, the party who begins has the right to the general reply if the other party calls witnesses. If the defendant introduces evidence to impeach the plaintiff's case, and also sets up an entirely new case which the plaintiff controverts by evidence, the defendant in his reply is confined to the new case set up by him.[4] Unless the defendant gives new evidence the plaintiff is not entitled to reply, there being no facts upon which his counsel can comment. The question as to what is proper testimony in rebuttal is purely within the sound discretion of the trial court.[5]

[2] Bradford v. Freeman, 5 Exch. 274.
[3] Ashley v. Bates, 13 M. & W. 589; Bather v. Brayne, 5 C. B. 655.
[4] Starkie's ed. 384.
[5] Goldsby v. United States, 160 U. S. 70, 16 S. Ct. 216.

CHAPTER XIX.

Prima Facie Evidence.

Section 190. General rule as to. Illustrations.
191. As to receipts, signatures, etc.

Sec. 190. General Rule as to. Illustrations.

While it is true that a person seeking a recovery of another in an action at law is charged with the burden of proving the issue in his favor, yet whenever the law interposes any presumptions in his favor, it often happens that he is only called upon to make *prima facie* proof. Therefore it is material to know what, in law, is regarded as *prima facie* evidence, so that its production by a party puts the other party in a position that he must rebut it, to prevent a recovery against him. *Prima facie* evidence means evidence which is sufficient to establish the fact unless rebutted. A *prima facie* case cannot prevail if rebutted or the contrary shown by competent proof, so if an assessment roll makes a *prima facie* case in a proceeding to effect betterments that the assessment is correct, where evidence is introduced of the injustice of the assessment then this evidence must be met by other testimony.[1] Thus, in an action upon a promissory note, unless a plea or notice denying its execution by the defendant is filed, the plaintiff is only required, in the first instance, to produce the note on trial, and the law presuming from its possession by him that it is still an outstanding obligation upon the makers and indorsers, its production makes, for the plaintiff, a *prima facie* case, and the burden is imposed upon the defendant to overcome the effect of this *prima facie* case, or the plaintiff will be entitled to a judgment for the amount apparently due upon it.[2] So, indorsements of interest on promissory notes are *prima facie* evidence of payment by the maker.[3]

[1] Wathen v. Allison Ditch District No. 2, 213 Ill. 138, 72 N. E. 781; Kelly v. Jackson, 6 Pet. (U. S.) 622.

[2] Conway v. Williams, 2 Hun (N. Y.), 642.

[3] Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

Statements of account furnished by a bank to a corporation from time to time are *prima facie* evidence of the state of the account between the bank and the corporation.[4] Although a book account against a man may afford *prima facie* evidence of indebtedness a book account against a married woman is not *prima facie* proof on account of the disability of the married woman and the liability of a husband for the support of his family.[5] The recording of a deed may be *prima facie* evidence of delivery, but not when other circumstances show that delivery was unlikely.[6]

So, in an action of trover, possession of a chattel is *prima facie* evidence of title, and imposes upon the plaintiff the *onus* of proving title in the chattel in himself, or that he has a right to its possession as against the defendant, and he must do this by such proof as fully overcomes the presumption of property in him who has possession.[7]

[4] Pauly v. Pauly, 107 Cal. 8, 40 P. 29, 48 Am. St. Rep. 98.

[5] Moore v. Copley, 165 Penn. State 294, 30 A. 829, 44 Am. St. Rep. 664.

[6] Egan v. Horrigan, 96 Maine, 46, 51 A. 246.

[7] Pinkham v. Gear, 3 N. H. 484; Finch v. Alston, 2 S. & P. (Ala.) 83; Drummond v. Hopper, 4 Harr. (Del.) 327; Trougott v. Byers, 5 Cow. (N. Y.) 480; Goodwin v. Garr, 8 Cal. 615; Entreken v. Brown, 32 Penn. St. 364; Vining v. Baker, 53 Me. 44; Fish v. Skut, 21 Barb. (N. Y.) 333.

This presumption of title to personal property in him who has possession is so strong that it is held that all species of personal property found among the effects of a deceased person belong to his heirs, and that if any person claims to be the owner thereof he must make out his title by clear and unmistakable proof of ownership in him, and beyond a doubt, Succession of Alexander, 18 La. Ann. 337; but possession of personal property by the consent of the true owner does not raise a legal presumption of title against the owner, but only against others, Magee v. Scott, 9 Cush. (Mass.) 148; and where property is found in the possession of several, the law refers the possession to him who has the true title, and this is the rule both as to real and personal estate, Maples v. Maples, Rice (S. C.), 300; Lenoir v. Rainey, 15 Ala. 667; Governor v. Campbell, 17 id. 566; Miller v. Fraley, 23 Ark. 735; so prior possession of land is *prima facie* evidence of a title in fee, and is good until a better title is proved, Herbert v. Herbert, Breese, 278; Hawkins v. County Commissioners, 2 Allen (Mass.), 251; Ward v. McIntosh, 12 Ohio St. 231; Hunt v. Titter, 15 Ind. 318; but such title may be overcome by one who has a better title thereto, and when a better title is established, the possession of the premises, if short of the statutory period, will be presumed to be in subordination to the title of the real owner, as adverse possession is never presumed by the law. But the *onus* of establishing the real title is upon him who sets it up; Allen . Harper, 59 Me. 371; Baldwin v. Buffalo, 35 N. Y. 375; Rowland v. Updike, 28 N. J. 101; Brandt v. Ogden, 1 Johns. (N. Y.) 156; Edmonston v. Shelton, 4 Jones (N. C.), 451; Austin v. Bailey, 37 Vt. 219; McCall v. Pryor, 17 Ala. 533; Russell v. Marks, 3 Met. (Ky.) 57; Rochell v. Holmes, 2 Bay (S. C.), 487; but when title is claimed by adverse possession without *color* of title, the *onus*, as against one having a clear documentary title, is on him who sets up the possessory title; Rowland v. Updike, 28 N. J. 101; Stewart v. Cheatham, 3 Yerg. (Tenn.) 60; Clifton v. Lilly, 12 Tex.

Where the death of a party becomes a material issue, a grant of letters of administration is *prima facie* sufficient evidence of his death;[8] so proof that he was missing at a particular time, and the circulation of a report and general belief that he was dead, is *prima facie* evidence of his death;[9] or that he has been absent and not heard from for seven years.[10] The record of the discharge of an insolvent or bankrupt debtor is *prima facie* evidence of notice to all his creditors;[11] so an entry in a day-book is *prima facie* evidence of the price and delivery of the goods charged there;[12] so an entry in a log-book is *prima facie* evidence of the truth of every particular of such entry;[13] so an acknowledgment of the payment of the purchase money in a deed is *prima facie* evidence of the fact;[14] so a receipt is *prima facie* evidence of all it purports to be, and no more;[15] therefore a receipt for so much money for property delivered is not *prima facie* evidence that it is in full for all such property previously delivered;[16] so a bill of lading,[17] or a certificate of preemption has been held to be *prima facie* evidence of title as against any other certificate or survey.[18] The record of a recovery in an ejectment suit is *prima facie* evidence of title to the

130; and all presumptions will be against him, and he will be required to make out his possessory title by strict proof; Edmonston v. Shelton, 4 Jones (N. C.), 451; Baldwin v. Buffalo, 35 N. Y. 375; but as against every person, except one having a clear documentary title, possession is sufficient, and all presumptions will be made in its favor. Nixon v. Carce, 28 Miss. 414; Clifton v. Lilly, 12 Tex. 130; Wendell v. Blanchard, 2 N. H. 456. It must be understood that a presumption of title from possession never arises except when the possession is perfectly consistent with an unqualified ownership. When it is shown that it was taken in subordination to the title of another, and that only a qualified interest or estate less than an absolute title was claimed, a grant will not be presumed. Colvin v. Warford, 20 Md. 357.

[8] French v. Frazer, 7 J. J. Marsh. (Ky.) 425.

[9] Jackson v. Etz, 5 Cow. (N. Y.) 314.

[10] Whiteside's Appeal, 23 Penn. St. 114; Bradley v. Bradley, 4 Whart. (Penn.) 173; Eagle v. Emmett, 4 Bradf. (N. Y.) 117; Osborn v. Allen, 26 N. J. 388; Newman v. Jenkins, 10 Pick. (Mass.) 515; Stevens v. McNamara, 36 Me. 176; Crawford v. Elliott, 1 Houst. (Del.) 465; Smith v. Knowlton, 11 N. H. 191; Caper v. Thurmond, 1 Ga. 538; Tilley v. Tilley, 2 Bland (Md.), 436; Primm v. Stewart, 7 Tex. 178; Spurr v. Taimbull, 1 A. K. Marsh. (Ky.) 278; Winship v. Connor, 42 N. H. 341; Stinchfield v. Emerson, 52 Me. 465; Hulett v. Hulett, 40 Vt. 384.

[11] Jay v. Slack, 4 N. J. L. 77.

[12] Ducoign v. Schneppl, 1 Yeates (Penn.), 347; McCoul v. Lekamp, 2 Wheat. (U. S.) 111.

[13] Douglass v. Eyre, Gilpin, 146.

[14] Thallhimer v. Brinkerhoff, 6 Cow. (N. Y.) 90; Gully v. Grubbs, 1 J. J. Marsh. (Ky.) 387.

[15] McDowell v. Lemaitre, 2 N. & M. 320.

[16] Reed v. Phillips, 6 Ill. 39.

[17] Benjamin v. Sinclair, 1 Bailey (S. C.), 174.

[18] Rector v. Welch, 1 Mo. 334.

premises involved in the action;[19] a decree in admiralty restoring the libeled property to the claimant is *prima facie* evidence of title thereto;[20] a judgment on an original attachment in another State is *prima facie* evidence of the debt, even though obtained without notice;[21] so is a judgment against a party not brought into court;[22] so is a sentence in a foreign court of admiralty unless it contains enough to rebut such presumption;[23] so, where an act of the legislature directs that the certificate of a public officer shall be evidence, a paper produced with his name will be *prima facie* evidence unless it is proved not to have been signed by him;[24] so where books of account or papers contain distinct settlements made at different times, the last settlement is *prima facie* evidence of the fact that it embraces all the others;[25] so a receipt acknowledging payment of a subsequent quarter's rent is treated as *prima facie* evidence that all the prior rent is paid;[26] the return of an officer upon a warrant is regarded as *prima facie* evidence of an arrest against both the grand juror and officer;[27] so the date of a writ or other process is *prima facie* evidence of the true time when it was issued;[28] but the date of a deed or contract is only *prima facie* evidence of the time when it was executed as between the parties thereto.[29] The return of a sheriff is *prima facie* evidence of what was done by him in a controversy between strangers to the suit in which it was made;[30] so the return of a sheriff on the back of an attachment is *prima facie* evidence of the property, so as to bind it on execution for the payment of the debt;[31] so an execution book kept by the clerk is *prima facie* evidence of the truth of all entries made in it, but it may be impeached by extrinsic evidence;[32] an order drawn upon one for money for value received is *prima facie* evidence that the drawer has received the money or its equivalent;[33] so an order payable out of a specific fund is *prima facie* evidence of debt;[34]

[19] Chirac v. Reinecker, 2 Pet. (U. S.) 622.
[20] Thompson v. Stewart, 3 Conn. 171.
[21] Miller v. Pennington, 2 Stew. 399.
[22] Taylor v. Pettibone, 16 Johns. (N. Y.) 66.
[23] Johnson v. Ludlow, 1 Caines' Cas. (N. Y.) 30.
[24] Prather v. Johnson, 3 H. & J. (Md.) 487.
[25] Dorsey v. Kollock, Coxe, 35.
[26] Brewer v. Knapp, 1 Pick. (Mass.) 332.
[27] Allen v. Gray, 11 Conn. 95.
[28] Society for Prop. of The Gospel v. Whitcombe, 2 N. H. 227.
[29] Baker v. Blackburn, 5 Ala. 517.
[30] Gray v. Gray, 3 Litt. 465.
[31] Huyer v. Osborne, 1 Bay, 319.
[32] Taylor v. Dundas, 1 Wash, (U. S.) 92.
[33] Child v. Moore, 6 N. H. 33.
[34] Curle v. Beers, 3 J. J. Marsh. (Ky.) 170.

so where an order is given by A. to B. on C. for certain property, B.'s receipt upon the order for the property is *prima facie* evidence in an action by C. against A. of the delivery of the property.[35]

The fact that a testator is under guardianship as a *non compos* at the time of the execution of a will is *prima facie* evidence that the testator had not the requisite mental capacity to make it.[36] The production of a contract or deed bearing the same name with the party in the suit is *prima facie* evidence of identity;[37] but otherwise if the name is not strictly identical;[38] and where a party claims an interest in an estate, something more than identity of name is required.[39]

The invoice of a cargo is, against the general principles of evidence, uniformly admitted as *prima facie* evidence of the *value* of the cargo, but of nothing more.[40] The registry of a vessel in a certain name is not even *prima facie* evidence that such person was the owner of the vessel.[41] A register's deed, purporting to be a conveyance of land sold for taxes, is *prima facie* evidence that his proceedings were regular.[42] Proof that a person has resided in a place is *prima facie* evidence that such place is still his residence.[43] Proof of the execution and registry of a mortgage deed is *prima facie* evidence of title in the mortgagee without the production of the note which it was given to secure.[44] The return of a constable on a writ is *prima facie* evidence of the facts contained in it, but may be rebutted.[45] The fact that a vessel was seaworthy when a policy attached is *prima facie* evidence that it continued so during the time of the risk.[46] The agreement of adjoining owners upon a dividing line is *prima facie* evidence that it is the true line.[47]

[35] Rawson v. Adams, 17 Johns. (N. Y.) 130.

[36] Stone v. Damon, 12 Mass. 488.

[37] Jackson v. King, 5 Cow. (N. Y.) 237; Brown v. Metz, 33 Ill. 339: Cates v. Loftus, 3 A. K. Marsh. (Ky.) 202; Cooper v. Parton, 1 Dur. (Ky.) 92; Gitt v. Watson, 18 Mo. 274.

[38] Ellsworth v. Moore, 5 Iowa, 486: Burford v. McCue, 53 Penn. St. 427.

[39] Maers v. Bunker, 29 N. H. 420.

[40] Graham v. Penn. Ins. Co., Wash., C. C. (U. S.) 113.

[41] Sharp v. U. S. Ins. Co., 14 Johns. (N. Y.) 201; Leonard v. Huntington, 15 id. 303.

[42] Bodly v. Hood, 2 A. K. Marsh (Ky.) 244.

[43] Prother v. Palmer, 4 Pike (Ark.), 456.

[44] Davis v. Mills, 18 Pick. (Mass.) 394.

[45] Perryman v. The State, 8 Mo. 208.

[46] Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389.

[47] Sparhawk v. Bullard, 1 Met. (Mass.) 95.

Sec. 191. As to Receipts, Signatures, Etc.—Evidence to vary or explain receipts, see § 22, *ante*.

A receipt for money, and expressed to be in full of all demands, is, however, only *prima facie* evidence of payment, and may be contradicted, varied or explained. It is not subject to the rule which excludes parol evidence to contradict or vary written instruments.[1] But all presumptions are in favor of the receipt, and the party attacking it must clearly show that its legal effect is not as expressed to be on the face of it; and when the evidence is contradictory, and the evidence on the one side is entitled to as much weight as that on the other, the receipt will stand.[2]

The seal of the general land office, and the signature of the commissioner thereof, *prima facie* prove themselves.[3] Recitals of title in an old deed, where possession accompanied the deed, are *prima facie* evidence against any person claiming title under the grantor previous to such deed.[4] The possession of checks, orders or drafts by the corporation or person on whom they are drawn is *prima facie* evidence that they have been paid.[5] A settlement between two parties is *prima facie* evidence of a settlement of all demands, but may be rebutted, and is no bar to a recovery for any matters not embraced therein.[6] An indorsement on a note is *prima facie* evidence of payment of the amount designated.[7] A receipt in full of all demands is *prima facie* evidence of payment of all notes, accounts and claims existing at the time of the receipt.[8] The acceptance, by a municipal corporation, of work which it was authorized to contract for, is *prima facie* evidence that the work is completed.[9] Proof of an entry upon another's premises is *prima facie* sufficient to support an action of trespass,

[1] Hill v. Robinson, 3 Jones (N. C.), 501; Borden v. Hope, 21 La. Ann. 581; Batdorf v. Albert, 59 Penn. St. 59; Dolan v. Frieberg, 4 W. Va. 101; The Galloway C. Morris, 2 Abb. (U. S.) 164; Middlesex v. Thomas, 20 N. J. 39; Pati's Case, 4 Ct. of Claims (U. S.), 523; Joslyn v. Capron, 64 Barb. (N. Y.) 599; Driver v. Hudspeth, 16 Ala. 348; Brook v. Quinn, 13 Md. 379; Rourke v. Story, 4 E. D. Smith (N. Y. C. P.), 54; Mt. Olivet Cemetery Co. v. Shubert, 2 Head. (Tenn.) 116; Gibson v. Hanna, 12 Mo. 162; Smith v. Ballou, 1 R. I. 496.

[2] Borden v. Hope, *ante;* Levi v. Carrick, 13 Iowa, 344.

[3] Harris v. Doe, 4 Blackf. (Ind.) 369.

[4] James v. Letzler, 8 W. & S. (Penn.) 192.

[5] Union Canal Co. v. Lloyd, 4 W. & S. 393.

[6] Nichols v. Scott, 12 Vt. 47.

[7] Graves v. Moor, 7 Monr. (Ky.) 341.

[8] Marston v. Wilcox, 3 Ill. 270.

[9] New Orleans v. Halpin, 17 La. Ann. 185.

and throws the *onus* upon the defendant of proving that his entry was lawful.[10]

Every person is presumed to know the contents of all papers to which he himself subscribes, or authorizes another to sign his name, whether he can read or write, and the production of an instrument thus signed is *prima facie* evidence of all it contains,[11] and that he knew the legal effect thereof;[12] but such evidence may be rebutted by proof of fraud or of undue advantage.[13]

[10] Belverman v. State, 16 Texas, 130.

[11] Harris v. Story, 2 E. D. Smith (N. Y. C. P.), 363; Bank v. Kimball, 10 Cush. (Mass.) 373; Clem. v. N. & L. R. R. Co., 9 Ind. 488.

[12] Mears v. Graham, 8 Blackf. (Ind.) 144.

[13] Harris v. Story, *ante*.

CHAPTER XX.

Public Documents.

Section 192. In general.
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Sec. 192. In General.

Writings may be divided into two classes, private and public. The former are those which are the property and in the custody

of individuals or corporations, and the latter are those which are the property and under the control of some department of the government, as legislative journals, records of courts, statutes, proclamations, ordinances, etc., and other writings of a similar character. The mode of proving the contents of these documents when they become material, is of considerable importance to the practitioner, and the object of this chapter is to furnish that information. As a matter of convenience it is held that public records may, independent of statute, be given by certified copies by the officer having such records in charge.[1] Also entries in public records may be proved by examined copies made by persons not having their official custody.[1a] And the original records are certainly at least as good evidence as any copies could be. If produced by the official custodian, they are admitted without further attestation. Otherwise there must be other evidence of their character. But there need not be a combination of the two methods of authentication. Either alone is sufficient. And where the records are identified by an unofficial witness, it is not material that his possession of them is unexplained, or even that it is wrongful.[2] The fact that a record book does not contain an entry of a given kind may be shown by the oral testimony of one who has examined the record.[3] Original records from a foreign country may be admitted where their removal is allowed and when proved to come from the proper custody.[4]

Sec. 193. Legislative Journals.

Where it becomes material to establish what was done by a legislative body at a particular session respecting a certain matter, it may be done by producing the journals themselves, where this can

[1] Younglove v. Knox, 44 Fla. 743, 33 So. 427.

[1a] Cooper v. Armstrong, 4 Kan 30; Winham v. Kline, 77 Mo. App. 36; Greenleaf on Evidence, vol. 1, § 485.

[2] State v. Pendleton, 67 Kan. 180, 72 Pac. 527, where an original marriage license was put in evidence by the recorder of the county who held office at the time when the paper was issued by the deputy recorder, although the witness no longer had any official possession and could not explain how he came by the paper.

[3] McPhelemy v. McPhelemy, (Conn., 1905), 61 A. 477. Parish record of births and marriages. Greenfield v. McIntire, 112 Ga. 691, 38 S. E. 44; State v. Rosenthal, (Wis., 1905), 102 N. W. 49; Sykes v. Beck, 12 N. D. 242, 96 N. W. 844, 852, to the effect that the examination must be by the custodian.

[4] Williams v. Conger, 125 U. S. 397, 410, 8 S. Ct. 933. Mexican land grant.

be done, or by the production of a printed copy thereof published by authority of the State,[1] or by a copy thereof duly certified by the Secretary of State. These journals being the record of the doings of a legislative body, import absolute verity, and cannot be impeached except by the legislature itself.[2] Thus where the journals show only that an order was reported, it was held that parol evidence was not admissible to show that it was passed by that body.[3]

[1] Root v. King, 7 Cow. (N. Y.) 613. The court should inspect these journals as it would any other record. Coleman v. Dobbins, 8 Ind. 156; Albertson v. Robinson, 1 Dall. (Penn.) 9. Journals of Congress, printed, have been admitted without other proof of their authenticity. Com. v. Dedoughamps, Whart. Dig. 280. But generally proof is required that the printed journals of a legislative body were printed by authority. Root v. King, 7 Cow. (N. Y.) 613. But a printed copy of public documents proved to have been transmitted to a legislative body, and printed by the printers to such body, are admissible without other authentication. Radcliffe v. United States Ins. Co., 7 Johns. (N. Y.) 50.

[2] McCullough v. State, 11 Ind. 424; Town of Wilson v. Markley (N. C.), 45 S. E. 1023. As to evidence to contradict or explain legislative journals, see § 35, *ante*.

[3] Covington v. Ludlow, 1 Met. (Ky.) 295.

But in Mississippi it is held that such journals do not import absolute verity, and are not conclusive of the facts stated in them. Green v. Weller, 32 Miss. 650. Indeed it is held that they are admissible to overturn even the statute roll; Chicot County v. Davies, 40 Ark. 206. See also State v. McClelland (Neb.), 25 N. W. Rep. 77; but in this case it was held that where there is a discrepancy between the manuscript and the printed minutes of the proceedings of the legislature, the manuscript will prevail. The journal of a legislative body is admissible to show that a bill which has been certified by the presiding officer of a legislative body as duly passed was not in fact passed, thus overthrowing the *prima facie* and presumptive effect of such certificate; State v. McClelland, *ante;* or even when certified by the presiding officers and signed by the governor. Spangler v. Jacoby, 14 Ill. 297; People v. Mahoney, 13 Mich. 481; State v. Hastings, 24 Minn. 78; Coleman v. Dobbins, 8 Ind. 156; Southwark Bank v. Com., 26 Penn. St. 446; People v. Starne, 35 Ill. 121; People v. Purdy, 2 Hill (N. Y.), 31; Berry v. Baltimore, etc., R. R. Co., 41 Md. 446. Opinions of Justices, 35 N. H. 579; 52 id. 522; 45 id. 607. People v. Supervisors, 8 N. Y. 318; Jones v. Hutchinson, 43 Ala. 721. See, however, holding that the validity of an invalid statute duly certified by the presiding officers of a legislative body cannot be impeached by the journals; Pacific R. R. Co. v. The Governor, 23 Mo. 353. See, also, Fouke v. Fleming, 13 Md. 392; Clare v. State, 5 Iowa, 509; Green v. Weller, 32 Miss. 651; Evans v. Bracom, 30 Ind. 514; People v. Devlin, 33 N. Y. 269; Pangborn v. Young, 33 N. J. L. 29. Says Mr. Phillips, 2 Phillips' Ev. 276; "These are the documents peculiarly appropriated to the purpose of preserving the memory of such proceedings, which do not appear capable of other authentic or satisfactory proof." These journals have been admitted where limitations upon peerages have been recited therein without other proof of their authenticity (Lord Duffrein's Case, 4 C. & F. 468), and generally the journals of either branch of a legislative body are admissible to prove what was done by that body in reference to a particular matter, where it is the duty of the officers thereof to keep a faithful record thereof. R. v. Franklin, 17 How. St. Tr. 636. Proclamation issued by the President of the

Sec. 194. Statutes.

Where a statute of a sister State or of one of the territories is to be proved the proof must conform to the act of Congress or else to the provisions of the statutes of the forum. A book purporting to contain the written laws of a foreign jurisdiction proves itself and is admissible as evidence without other authentication, but its authenticity cannot be shown by the mere statement of counsel as to what it is. So an offer of an extract from an alleged statute book without showing its title page, is insufficient.[1] Evidence of a statute of another State should consist of transcripts of those statutes published under authority of the legislature of that State.[2] Where a certain section from a code of laws of another

United States, or the governor of a State, published by authority, reciting a certain condition of things, is evidence that such condition of things existed (R. v. Holt, 5 T. R. 443; Picton's Case, 30 How. St. Tr. 493; Judd's Cace, 8 St. Tr. 212), as of the surrender and capitulation of an island (Picton's Case) *ante*, or indeed of any matter which is peculiarly within the knowledge of the government. Thus the date of the declaration of war may be proved by the declaration of the ambassador transmitted by him to the Secretary of State and printed by the authority of the government. Thelluson v. Colling, 4 Esp. 266. But the fact that a ratification of a blockade of a certain port has been printed by authority does not raise a presumption that a certain person knew of the blockade, but such knowledge must be proved as a fact. Harratt v. Wise, 9 B. & C. 712. In England, the public acts of the government published in the Gazette, may be proved by the Gazette. R. v. Holt, 5 T. R. 442; Kirwan v. Cockburn, 5 Esp. 283; Graham v. Hope, Peake, 142; Munn v. Baker, 2 Starkie, 255. But in this country we have no official journals of the government, and public acts published by the government printer by authority occupy the same position as evidence as their publication in the Gazette does in England. Such publications, however, are not evidence of private titles or interests or of any matter which has no reference to government concerns. R. v. Holt, *ante;* Kirman v. Cockburn, 2 Esp. 233.

The statute law of another State or country must be produced, but the common or unwritten law may be proved by parol, Robertson v. Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569; Robinson v. Clifford, 2 Wash. (U. S. C. C.) 1; United States v. Ortega, 4 id. 53. Otherwise they will be presumed to be the same as those of the former. Davis v. Rogers, 14 Ind. 424; Hemphill v. Bank, 14 Miss. 44. Foreign laws and regulations, unless shown to be in writing, may be proved by parol, especially those relating to such. Livingston v. Marine Ins. Co., 6 Cranch (U. S.), 274; Kenny v. Clarkson, 1 Johns. (N. Y.) 385; McRae v. Mattson, 13 Pick. (Mass.) 53. See as to presumption of law of another state, *ante*, § 178.

[1] Hewitt v. Bank of Indian Territory, (Neb., 1902), 92 N. W. 741.

[2] So Birdseye's Revised Statutes of New York have been held inadmissible as they are published by an individual although they contain a certificate of the secretary of state of their correctness. Goodwin v. Provident Savings Life, etc., Associa-

State is read in evidence and no other part of the code is formally offered in evidence the court is still not confined to the particular sections read, but may look into the volume in which it appears for other sections bearing upon the same subject.[3]

Statutes purporting to be published by authority of a State are admissible to prove what the statute law of such State is upon a given matter,[4] and the burden of discrediting them is upon the party against whom they are offered.[5] Although the certificates of the proper officers of the legislature and the approval of the governor are conclusive on the court as to the passage of a statute, still the court may examine the journals of the houses of the legislature to ascertain whether the constitutional requirements as to its passage have been observed.[6] Where a special statute of another State is produced by a copy duly authenticated it is sufficient to prove the law of the State without proof of constitutional authority in the legislature to pass such an act even though the law of the State of the forum prohibited the passing of such acts.[7] Printed statutes, purporting to be printed by authority of a State or country, are, however, only *prima facie* proof, and may be discredited by a copy of the statute duly certified by the secretary of State, under the seal of the State; and in some of the States an exemplified copy of the statute must be produced.[8] In other States, even

tion, 97 Iowa, 226, 66 N. W. 157, 59 Am. St. Rep. 411. In Alabama the statutes of another State may be proved by the introduction of a book purporting to be published by authority of the legislature of that state, although published by a private person. Falls v. United States, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, Alabama statute said must be published by authority of the legislature. In New Hampshire the rule is that a foreign statute may be proved by oral evidence of one who had examined the foreign laws, or by producing either what purports to be an official copy or a copy prepared by an ordinary scrivener. Hall v. Costello, 48 N. H. 176; Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 23 S. Ct. 517. To same effect see Barrows v. Downs, 9 R. I. 446.

[3] Spears, *Ex parte*, 88 Cal. 640, 22 Am. St. Rep. 341, 26 P. 608.

[4] Bright v. White, 8 Mo. 421; Toulandon v. Lachenmeyer, 6 Abb. Pr. (N. Y.) N. S. 215; State v. State, 1 D. Chip. (Vt.) 303; Mullen v. Morris, 2 Penn. St. 85; Cox v. Robins, 2 S. & P. (Ala.) 91; Barkman v. Hopkins, 11 Ark. 157; Campanet v. Jernegan, 5 Blackf. (Ind.) 375; Vaughan v. Griffiths, 16 Ind. 353; Thomas v. Davis, 7 B. Mon. (Ky.) 227; Owen v. Bagle, 15 Me. 147; Merrifield v. Robbins, 8 Gray (Mass.), 150; Braughan v. Graham, 2 Miss. 220; Stewart v. Swanzy, 23 Miss. 502; Lord v. Staples, 23 N. H. 448; Kean v. Rice, 12 S. & R. (Penn.) 203; Allen v. Watson, 2 Hill (S. C.), 319; Martin v. Payne, 11 Tex. 292; Ellis v. Wiley, 17 Tex. 134; State v. Abbey, 29 Vt. 60.

[5] Emery v. Bean, 26 N. H. 152.

[6] Town of Wilson v. Markley, (N. C.), 45 S. E. 1023.

[7] Fidelity Insurance Trust and Safe Deposit Co. v. Nelson, 30 Wash. 340, 71 Pac. 961.

[8] Packard v. Hill, 2 Wend. (N. Y.)

the printed statutes of a foreign country may be used in evidence if a witness is produced who swears that he received them from the king's printer,[9] or where it is shown that they have been sanctioned by the executive and judicial officers of such country.[10] But generally, in all of the States, a copy of the statutes of a State purporting to be printed "by authority" of the State are received as evidence, and if they are inaccurate the other party must show it.

Where a foreign statute is offered in evidence the testimony of an expert as to its accepted and proper construction in the foreign country, is admissible upon any matter open to reasonable doubt.[11]

A statute and the preamble is only conclusive as to the law and if any facts are recited therein, as if the preamble states "whereas, the inhabitants of Windsor county are now in a state of insurrection, etc.," the statute is not conclusive as to the fact, and evidence is admissible to show that no such condition existed; and the same rule prevails as to any recital of facts,[12] and as to any statute, whether foreign or domestic.

The facts recited in the preamble of a private statute may be evidence between the State and the applicant or party for whose benefit the act passed. But as between the applicant and another individual, whose rights are affected, the facts recited ought not to be evidenced.[13] Nor will an act, private in its nature, be admis-

411. But under the law of 1868 the authorized printed statutes of another State may now be used. Persee, etc., Paper Works v. Willett, 19 Abb. Pr. (N. Y.) N. S. 215; State v. Jackson, 2 Dev. L. (N. C.) 563; Wilson v. Leuzier, 11 Gratt. (Va.) 477.

[9] Jones v. Maffit, 5 S. & R. (Penn.) 523.

[10] Owen v. Bagle, 15 Me. 147.

[11] Slater v. Mexican Natl. R. R. Co., 194 U. S. 120, 24 S. Ct. 581. But see Hancock Natl. Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232. In Washington it has been held that evidence as to the statute of another state by testimony of an attorney of many years' experience in that state to a consensus of the opinion of the bench and bar of that State as to the meaning of a certain section is too indefinite and uncertain. The court says that where the text of a statute of a sister State is before the court it should be first ascertained what construction has been placed upon the statute by the courts of that state and in the absence of such construction the court of the forum should construe the statute according to the same rules that are applicable in the construction of a domestic statute. Clark v. Etlinge, (Wash., 1905), 80 Pac. 556.

[12] R. v. Greene, 6 Ad. & El. 548.

[13] Elmendorf v. Carmichael, 3 Litt. (Ky.) 472, 480.

In the case last cited, the court, in their opinion in this case, observe: "We well know that such applications are frequently made *ex parte*, and if they are not entirely so, but the party affected appears and resists the statute, it is very questionable whether the facts recited ought to be evidence in a future contest. The legislature, in all its inquiring forms by committees, make no issue, and in their discretion may or may not coerce the attendance of witnesses or

sible in evidence as against strangers, although it contain a clause declaring "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded." Such a clause relates merely to the forms of pleading, and does not vary the nature and operation of the act.[14] In a New York case,[15] the court held that a statute passed to confirm certain official acts of a justice of the peace, stating that he became a tavern keeper on a particular day, was not evidence of that fact as against a stranger. The legislature has no jurisdiction to determine facts touching the rights of individuals. So of various other defenses, founded upon statutes—as, for instance, the statute of limitations, which the defendant cannot avail himself of under the general issue.[16]

Except where otherwise provided by statute, private acts of the legislature, as charters of private corporations, etc., must be proved, which may be done either by a copy of the act duly certified by the secretary of State, or in most of the States by the printed statutes of the State;[17] but of all public statutes of the State in which the court is held, or which are declared to be so in the act itself, the court will take judicial notice, and no proof in reference thereto is required, and in some of the States it is provided by statute that all private acts printed in the public statutes or by authority of the State shall be received as evidence thereof.[18]

the production of records, and are frequently not bound by the rules of evidence applicable to an issue properly formed, the trial of which is an exercise of judicial power. Once adopt the principle that such facts are conclusive or even *prima facie* evidence against private rights, and many individual controversies may be prejudged and drawn from the functions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the legislature are to make laws to operate on future incidents, and not the decision of or forestalling rights accrued or vested under previous laws. Hence such a preamble as the present ought, in such a controversy, to be taken to answer the purpose for which it was intended; that is, an apology for the passage of the act, and the reason why the legislature so acted. Such a preamble is evidence that the facts were so represented to the legislature, and not that they really existed."

[14] Brett v. Beales, 1 M. & M. 421, 425.

[15] Parmelee v. Thompson, 7 Hill (N. Y.), 77.

[16] Levi v. Gadsbury, 3 Cranch (U. S. C. C.), 180.

[17] Bank v. Wallaston, 3 How. (Del.) 90; Leland v. Wilkinson, 6 Pet. (U. S.) 317; Baring v. Harmon, 13 Me. 361.

[18] Baring v. Harmon, 13 Me. 361; Walker v. Armstrong, 2 Kan. 198.

Sec. 195. Common Law of Another State or Country.

What the laws of foreign countries are, when made an issue in a case, must be proved as other facts. If they are written, the laws themselves, or authenticated copies, must be produced; if they are not written, then they may be proved by the evidence of witnesses who are competent to testify on the question.[1] Where the evidence of the law of another State consists entirely of statutes or reports of judicial decisions the constructions and effects of the statutes and decisions are usually for the court alone. Where the decisions are conflicting and where inferences of fact must be drawn, the question of what the law is becomes one of fact.[2] The unwritten law of another State or country, when required to be proved as a fact in a case, cannot generally be proved by the printed reports of the decisions of its courts, but must be proved by witnesses learned in the law of the State.[3] But in some of the States by statute,[4] such reports are made admissible. In the appellate courts, such reports are always accepted as evidence of what the courts of another State have held upon certain questions. A law dictionary may be admitted in evidence to prove foreign law on proof that it is accepted authority.[5]

Although it is the general rule that the laws of another State must be pleaded and proved like any other fact, this does not require such laws to be pleaded when they consist of mere matters of evidence so under a general plea of payment evidence of the law of another State as to the effect of the giving of a note may be admitted.[6]

Sec. 196. Records of Births, Marriages and Deaths.

Registers kept by officials who are required by law to register particular transactions occurring in their presence, or who make such memoranda as are incident to the course of public business transacted by them, are sometimes admissible in evidence to estab-

[1] Robertson v. Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569.

[2] Hancock National Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232.

[3] Gardner v. Lewis, 7 Gill (Md.), 377.

[4] Lockwood v. Crawford, 18 Conn. 361: Penobscot, &c., R. R. Co. v. Bartlett, 12 Gray (Mass.), 244.

[5] Banco de Sonora v. Bankers' Mut. Casualty Co. (Iowa, 1904), 100 N. W. 532, s. c. 124 Iowa, 576, 95 N. W. 232.

[6] Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536.

lish facts stated therein, although no statutory provision that such registers shall be evidence of the facts contained therein exists, credibility being given thereto because they are made under the sanction of an official oath or under the duty and responsibility attaching to their official position. To entitle a book to the character of an official register it is not always necessary that it should be required to be kept by an express statute, nor even that the nature of the office should render the book indispensable. It is sufficient if it is directed to be kept by the proper officer.[1] Thus, in the case last cited the book of accounts kept by the alcalde was held admissible as a register of the acts of that officer and belonging to the office. So parish and parochial registers are evidence that the facts contained therein, *which are by law required to be recorded,* occurred on the day named therein, as that a marriage between certain parties occurred at the time stated in such register.[2] So the records of births and deaths kept by a religious society, when proved, are evidence of the time of the birth of a child or the death of a person.[3] Baptismal records of the Roman Catholic church kept in Ireland, where they are admissible as evidence of pedigree, are also admissible in this country,[4] but an entry in a church record not kept because required by law to be kept, is not admissible without proof of the handwriting of the writer when he is deceased.[5] But when the original is not of a public nature a sworn copy must be produced. So hospital records not kept under any requirement of law, are not public records and so not admissible unless supported by the testimony of the one who made them, if that person is still alive and within reach.[6] But in New Jersey it is held that a certified, sworn, or examined copy from the parish register of the Catholic church, kept under the rules and requirements of that church, is admissible when coming from proper custody.[7] In New York a record of the cause of death

[1] Kyburg v. Perkins, 6 Cal. 674.

[2] Wollaston v. Barnes, 1 M. & M. 386; Miner v. Boucham, 15 Johns. (N. Y.) 226; Milford v. Worcester, 7 Mass. 48.

[3] Stoever v. Whitman's Lessee, 6 Binn. (Penn.) 416.

[4] Collins v. German American Mutual Life Association (Mo. App., 1905), 86 S. W. 891.

[5] Murphy v. People, 213 Ill. 154, 72 N. E. 779.

[6] Cashin v. New York, N. H. & H. R. Co., 185 Mass. 543, 70 N. E. R. 930.

[7] Hancock v. Supreme Council Catholic Benev. Legion, 69 N. J. 308, 52 A. 301.

kept by the board of health as required by law, is not admissible in a suit between private parties, although the statute provides that such records shall be *prima facie* evidence of the facts therein set forth, as they are kept under what are in effect police regulations for local purposes and are not public records.[8] Even certified copies of public records of the registrar of births, deaths and marriages are usually admissible.[9] A register book of baptisms is not evidence unless it was made at the time of the fact, or so near thereto as to preclude all idea of collusion or misrecollections, and by the minister or his clerk who witnessed the ceremony.[10] Nor generally are such registers evidence of any fact not required to be recorded in them, or which was not witnessed by the person making the entry.[11] Thus, an entry in a baptismal register is evidence of the date of baptism, but it is not evidence of the date of birth, even though it is stated therein.[12] But such a register, used for the purpose of proving the place of baptism, may also form a part of a chain of evidence to prove the birth of the person baptized within a certain parish, as where it is shown by evidence *dehors* the register that the child was very young when baptized, although the register is silent upon that point.[13] And in all cases evidence *dehors* the register is necessary to identify the parties.[14] In an English case,[15] in an issue out of chancery as to whether a certain person was a legitimate child, a baptismal register, in which such person was described as "illegitimate," was admitted by ALDERSON, B., as affording some evidence of the fact. An entrance in a register which does not purport to be of a fact of which the person making it had knowledge, is not admissible as an entry of baptism in which the party is "said to be born in 1795."[16]

A bishop's register is, in England, evidence of facts stated in

[8] Beglin v. Metropolitan Life Ins. Co., 173 N. Y. 374, 66 N. E. R. 102; Buffalo Loan, etc., Co. v. K. T. & M. M. Aid Association, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839.

[9] Murray v. Supreme Lodge N. E. Order of Protection, 74 Conn. 715, 52 A. 722; McKinstry v. Collins, 74 Vt. 147, 52 A. 438.

[10] Warren v. Bray, 8 B. & C. 813.

[11] Birt v. Barlow, Dang. 170.

[12] Wilhen v. Law, 3 Stark. 63; Duins v. Donovan, 3 Hagg. Ecc. 301; Burghart v. Angenstine, 6 C. & P. 690; R. v. North Petherton, 5 B. & C. 508; R. v. Clapham, 4 C. & P. 29.

[13] R. v. North Petherton, 5 B. & C. 508.

[14] Birt v. Barlow, *ante;* Draycott v. Draycott, 12 Vin. Abr. 89.

[15] Cope v. Cope, 1 M. & R. 269.

[16] Duins v. Donovan, 3 Hagg. Ecc. 301.

it.[17] But a register of burials kept by the Wesleyan Chapel has been there repudiated as incompetent.[18] A register of the births of dissenter's children, kept at a public library, is not evidence.[19]

A sworn copy, from the register book, of the burials in Christ Church, Philadelphia, has been received in evidence to show the fact of the death of a person and the time.[20]

In Louisiana, the register of baptisms and births is evidence, and it seems, when shown to exist, precludes parol testimony.[21] An alteration in such baptismal register, by erasing the word "natural," and writing over it the word "legitimate," has no effect in preventing the registry from being used to establish the period of birth, though the alteration be not accounted for. Otherwise, however, if the document were offered to establish the legitimacy of the person named.[22] A register of burials is also evidence there; and where a register of baptisms proved that a child was christened by the name of "Francisco Antonio," and a register of burials attested the interment of a person named "Francisco," and no question was raised in the inferior court on the point of variance, held, that on appeal the appellate court must consider the one whose death was attempted to be proved to be the person whose death, according to the pleadings, it was important to establish.[23]

In Pennsylvania, a copy of the register of marriages, baptisms and burials, kept in a parish in the island of Barbadoes, certified to be a true copy by the rector of the parish, and proved by the oath of a witness, taken before the deputy secretary of the island and notary public (his handwriting and office being proved), has been received as good evidence of pedigree.[24] And a copy of a register of birth and deaths of the people called Quakers, kept in England, proved to be a true one before the lord mayor of London, has also been allowed as evidence in Pennsylvania to prove the death of a person.[25] By a statute in that State, the register kept by any religious society of births, marriages and deaths is declared good evi-

[17] Arnold v. The Bishop of Bath, 5 Bing. 316; 2 M. & P. 559.

[18] Whittuck v. Waters, 4 C. & P. 375.

[19] Ex parte Taylor, 1 J. & W. 463.

[20] Lewis v. Marshall, 5 Pet. (U. S.) 470, 475, 476.

[21] Duplessis v. Kennedy, 6 La. 231, 242; Fletcher v. Cavalier, 4 Mill. (La.) 267.

[22] Fletcher v. Cavalier, *supra*.

[23] Celis v. Oriol, 6 La. 403.

[24] Kingston v. Lesley, 10 S. & R. (Penn.) 383.

[25] Hyam v. Edwards, 1 Dall. (Penn.) 2.

dence. The act is silent as to the mode of proof, and therefore the common-law mode, which is by a sworn copy, or the production of the original must be resorted to. A certified copy, under the seal of the corporation or religious society, is not admissible.[26]

In Maine, a book was produced by a town clerk, which had been received by him from his predecessor in office as an official record; it purported to contain a record of births and marriages in such town, but contained no title or attestation of its character, nor any certificate showing by whom the entries in it were made; and held, that it was proper *prima facie* evidence to prove the age of a person named in it.[27] A copy from the records of the town is there admissible.[28]

In New York, sworn copies of such registers, when the original is of a public nature, have been held admissible.[29]

In North Carolina, a registry of births, marriages and burials, kept pursuant to the statute, is legal evidence of marriages, births, etc., especially on questions of pedigree; and the court lay it down as a general rule that a book kept by public authority is necessarily evidence of the facts recorded in it.[30]

In a New York case,[31] a sworn copy of the records of the town of Stonington, Connecticut, was held admissible in New York, on a question of pedigree. In Ohio, where the defendant, on a trial in ejectment, offered the deposition of the town clerk of New Milford, Connecticut, to prove the correctness of a copy of the records of that town, showing the time of the defendant's birth, the court held that it must be further shown that the record copied was kept under the authority of law; that a sworn copy of a private paper is nothing without proof of the original being executed, and until it was proven that the paper copied by the clerk in this case as a record was legally entitled to that character it was inadmissible.[32]

A marriage certificate, where it is necessary to show that the priest who performed the ceremony signed the certificate, may be proved by evidence that the certificate was given to the husband

[26] Stoever v. Whitman, 6 Binn. (Penn.) 416.

[27] Summer v. Sebec, 3 Me. 223. See Martin v. Gunby, 2 H. & J. (Me.) 248.

[28] Wedgwood's Case, 8 Me. 75.

[29] Bogert v. King, 5 Cow. (N. Y.) 237; Miner v. Boneham, 15 Johns. (N. Y.) 226.

[30] Jaycock v. Gilliam, 3 Murph. (N. C.) 47, 52.

[31] Miner v. Boneham, *ante*.

[32] Richmond v. Patterson, 3 Ham. (Ohio) 368.

immediately after the ceremony by the priest.[33] An original marriage license may be put in evidence by the recorder of the county who held office at the time when the paper was issued by the deputy recorder although the witness no longer has any official position and cannot explain how he came by the paper.[34]

Sec. 197. Ship Registers.

The effect of the registers of ships is of a different nature from that of parish registers. To give them the effect of proving the facts stated in them, would enable parties to make evidence for themselves; the entry not being of any transaction of which the public officer who makes the entry is conusant. The entry, therefore, or the absence of it, is a fact to be proved, and does not furnish evidence of any other fact. Thus, the register or certificate is not *prima facie* evidence of title in favor of the owner;[1] nor against him, unless proved to have been made with his consent, or to have been recognized by him.[2] But the register and certificate of register are conclusive evidence of want of title against those who are not named in the register.[3] A British register describing a vessel to be British built is not evidence of that fact.[4] The States severally have no right to require the owners of steamers navigating their internal waters to file at a seaport the name of the boat and owners, their residences and respective interests, under oath, under penalty of a forfeiture.[5] The same principle applies to steam lighters and tow-boats employed in the lower and inner bay of Mobile.[6] But a statute of the State requiring the mortgage of a vessel to be acknowledged and recorded in a particular manner is valid, so that a failure to record the mortgage renders it void as against creditors.[7] The register is not a document re-

[33] Fratini v. Caslini, 66 Vermont, 273, 29 A. 252, 44 Am. St. Rep. 843.

[34] State v. Pendleton, 67 Kan. 180, 72 Pac. 527.

[1] Flower v. Young, 3 Camp. 241; Pirie v. Anderson, 4 Taunt. 652.

[2] Tinkler v. Walpole, 14 East, 226. See, also, Fraser v. Hopkins, 2 Taunt. 5; Cooper v. South, 4 id. 802; Curling v. Robertson, 7 M. & G. 336; Young v. Brander, 8 East, 10; Jennings v. Griffiths, Ry. & M. 42; Cox v. Reid, id. 199; M'Iver v. Humble, 16 East, 169.

[3] Camden v. Anderson, 5 T. R. 709; explained in Tinkler v. Walpole, 14 East, 226; Marsh v. Robinson, 4 Esp. 98. And see Teed v. Martin, 4 Camp. 90; Robertson v. French, 4 East, 136; Hubbard v. Johnstone, 3 Taunt. 177; Thomas v. Foyle, 5 Esp. 88.

[4] Reusse v. Myers, 9 Camp. 475.

[5] Sinnot v. Davenport, 22 How. (U. S.) 227.

[6] Foster v. Davenport, 22 How. (U. S.) 244.

[7] Aetna Ins. Co. v. Aldrich, 26 N. Y. 92.

quired by the law of nations as expressive of a ship's national character,[8] but is of local or municipal regulation and the object of it has been said to be to show the character of the vessel, and entitle her to the advantages secured by law to the vessels of our own country.[9] Transfers of ships, it seems, in England, are declared void unless certain formalities prescribed by the registry acts are pursued. But there is no corresponding provision in the act of congress.[10] The effect and competency of the register of a vessel as evidence has been considered in several cases in the courts of this country. Our laws recognize the possibility of the register's existing in one name while the ownership is in another. The ownership and character of a vessel are matters *in pais*. The register is not an exclusive test of either. Hence on an indictment for piracy, the character of the vessel plundered may be shown without any effort to produce her certificate of registry.[11] In an action to recover back a premium of insurance on the ground that the plaintiff had no interest in the vessel at the time of insurance, the register, which was in the name of other persons, was held not even *prima facie* evidence to prove that the plaintiff was not owner.[12] So where a person purchased a vessel, and took immediate possession, but it was agreed that no bill of sale was to be executed till the purchase-money was all paid, held that the vendor was not liable for repairs made to the vessel by direction of the master on the credit of the purchaser, and this though the register still stood in the name of the vendor. That circumstance, the court say, did not in any manner determine the ownership.[13] And so, in Massachusetts, where the register was relied on by underwriters in an action on a policy of insurance for the purpose of showing that two of the insured had no legal or insurable interest in the vessel.[14] In Connecticut, however, though the register of a vessel is not conclusive of ownership, yet where a person by such a register made on his own oath appears to be the unconditional owner;

[8] Cheminant v. Pearson, 4 Taunt. 367.

[9] Sharp v. United Ins. Co., 14 Johns. (N. Y.) 204.

[10] Colson v. Bonzey, 6 Me. 474, 477. See, also, Bixby v. Franklin Ins. Co., 8 Pick. (Mass.) 86, 88, 89; Birbeck v. Tucker, 2 Hall (N. Y.), 121; Ring v. Franklin, 2 id. 1; Wendover v. Hogeboom, 7 Johns. (N. Y.) 308.

[11] United States v. Furlong, 5 Wheat. (U. S.) 184, 199.

[12] Sharp v. United Ins. Co., 14 Johns. (N. Y.) 201.

[13] Leonard v. Huntington, 15 Johns. (N. Y.) 298.

[14] Bixby v. Franklin Ins. Co., 8 Pick. (Mass.) 86.

held, by four judges against three, that it must be considered as a declaration to the world that he is owner, and he becomes liable, of course, for necessary disbursements in repairs and supplies procured by the master during the voyage.[15] The register cannot be rendered evidence of ownership in favor of the person who procured it to be made, though it may be against him.[16] In an action against owners of a vessel for a violation of a contract made by the plaintiffs for the transportation and delivery of goods with the master, a copy of the register, which purported to have been made on the oath of all the defendants that they were the owners, was held good evidence of their being such, and this on proof merely that the copy was a copy of the record in the custom-house, though, the witness could not say whether the record was the original or a copy.[17] It is *prima facie* evidence in these and similar cases, but is not conclusive.[18] The register is used as evidence in showing a fulfillment of warranty as to the character of property in actions upon policies of insurance.[19] And in such cases it has been said that proof that there was a register is *prima facie* evidence of its being on board during the voyage.[20] The register may be proved by a sworn copy.[21] A copy certified by the collector in whose office it is recorded is not evidence. He is not authorized to certify, nor intrusted to give out copies.[22] A copy produced from the treasury department of the United States, where the original is required to be filed after a vessel is condemned, certified by the register of the department, whose official character was attested by the secretary under the seal of the department, has been held competent evidence in the case of a condemned vessel.[23] It seems that a deputy collector's certificate of enrollment is conclusive of the facts certified.[24] The commission of a vessel or person granted by a foreign

[15] Starr v. Knox, 2 Conn. 215.

[16] Ligon v. Orleans Nav. Co., 7 Mart. (La.) 682.

[17] Hacker v. Young, 6 N. H. 95.

[18] Colson v. Bonzey, 6 Me. 474; Cox v. Reid, 1 C. & P. 602; Hussey v. Allen, 6 Mass. 163.

[19] Catlett v. Pacific Ins. Co., 1 Wend. (N. Y.) 561.

[20] 1 Wend. (N. Y.) 578. See Ludlow v. Union Ins. Co., 3 S. & R. (Penn.) 133.

[21] Coolidge v. New York Firemen Ins. Co., 14 Johns. (N. Y.) 308, 315; United States v. Johns. 4 Dall. (U. S.) 415; Hacker v. Young, 6 N. H. 95.

[22] Coolidge v. New York Firemen Ins. Co., 14 Johns. (N. Y.) 308. See United States v. Johns., 4 Dall. (U. S.) 415; Woods v. Courter, 1 id. 141.

[23] Catlett v. Pacific Ins. Co., 1 Wend. (N. Y.) 561.

[24] Hinckley v. Briagman, 46 Me. 450.

government may be proved by the commission itself under the seal of such government.[25] The seal, in general, proves itself, but otherwise as to the seal of a new government unacknowledged by the United States. The fact that the person or vessel was in the employ of such unacknowledged government may be shown without proving the seal.[26] Where the commission has been lost, its previous existence on board may be shown by parol evidence.[27] The log-book of certain vessels is, in the United States, made evidence by act of congress of the fact of desertion by a seaman. It is, however, never conclusive, but only *prima facie* evidence, and may be rebutted.[28] The log-book, in general, ought not to be admitted to establish any facts save such as are contemplated by the act of congress.[29] It is in no sense, *per se,* evidence, except in certain cases provided by statute. It does not import legal verity, and in every other case is mere hearsay not under oath. It may be used against persons, however, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defense. But it cannot be received as evidence for such persons, or others, except by force of a statute rendering it so.[30] On an indictment of several seamen for a revolt and confining the master, they defended on the ground (among others) that the master was insane. To rebut this, the prosecutor offered the log-book, kept by the master during the period of his alleged derangement, in which, as he said, he made entries every night; held, that it was inadmissible.[31] An entry in the log-book is indispensable evidence of the fact of desertion, when a forfeiture of wages is insisted on; it is necessary, in order to show that no consent was given, and no release was intended by receiving the delinquent again on board, as well as to ascertain the fact of desertion generally with greater accuracy.[32]

[25] The Estrella, 4 Wheat. (U. S.) 298.

[26] United States v. Palmer, 3 Wheat. (U. S.) 634, 635.

[27] The Estrella, 4 Wheat. (U. S.) 298; Rundle v. Beaumont, 4 Bing. 537.

[28] Jones v. The Brig Phoenix, 1 Pet. Adm. Dec. 201; Malone v. The Mary, id. 140; Thompson v. The Ship Philadelphia, id. 210; Douglas v. Eyre, 1 Gilp. (U. S. C. C.) 147, 152, 153, 154; Orne v. Townsend, 4 Mason, 541.

[29] Jones v. The Brig Phoenix, *supra.*

[30] *Per* STORY, J., in United States v. Gilbert, 2 Sum. (U. S.) 77, 78.

[31] United States v. Sharp, 1 Pet. (U. S. C. C.) 118, 119.

[32] Malone v. The Mary, 1 Peters' Adm. Decis. 140; Phoebe v. Dignum, 1 Wash. C. C. Rep. 48; Douglas v. Eyre, Gilp. (U. S. C. C.) 147.

Sec. 198. Patents for Inventions.

A duly certified copy of a patent issued by the authority of the government, proves itself, if in due form and properly executed and certified by the proper officer under the seal of his department, and a second or duplicate patent is of as high authority as evidence as the original,[1] and the authority even of an "acting commissioner" cannot be questioned in a proceeding to which he is not a party.[2]

Sec. 199. Patents for Lands.

The recitals of a United States land patent are evidence indisputable of the consideration upon which and the authority under which the patent is issued and such patent is *prima facie* evidence of title in the patentee.[1] A copy of an old land patent which has been for many years recorded in the proper office, is admissible as evidence of title, although it does not appear that it was proved or acknowledged, or that the person signing it, signed it as governor.[2] Thus in the case last cited a copy of a patent signed "Samuel Matthers," dated 1658, and recorded in the county court, together with an assignment of it, which assignment was acknowledged and admitted to record, was held evidence of title in Virginia, although it did not appear that the patent was proved or acknowledged, or that it was signed by Matthers, as governor. A complainant alleged in his bill the grant by letters patent of the estate claimed in 1705, and afterward, on the introduction of the letters patent by the defendant, objection was made because they did not bear the governor's signature. It was held that the letters patent were valid without the governor's signature, because, as the royal grants were made by record, and not by deed, and the letters patent were mere transcripts of the record, the great seal affixed to the transcript was evidence of the grant to the public.[3] A certificate of purchase from one of the United States land offices, is evidence of an equitable interest in the purchaser.[4] The admis-

[1] Hines v. Greenlee, 3 Ala. 73; Peck v. Farrington, 9 Wend. (N. Y.) 44; Davis v. Gray, 17 Ohio St. 330.

[2] Woodworth v. Hall, 1 W. & M. (U. S. C. C.) 389.

[1] Ledbetter v. Borland, 128 Ala. 418, 29 So. 579.

[2] Lee v. Lappscott, 2 Wash. (Va.) 276.

[3] Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

[4] Kay v. Watson, 17 Ohio, 27.

sion of a patent to be read in evidence was objected to because the letter C, used as a Roman numeral, was interlined; but it was admitted, on the presumption that the interlineation was made before issuing the patent; and the admission was held not to be error.[5] Assignments of land certificates, left in the general land office to procure a patent, are not admissible in evidence as "copies of records," etc., until constituted and recognized as records by the issuing of the patent.[6] An entry, in the books of the land office, that the balance of the purchase-money was paid by the person "to whom the patent had issued," is evidence that a patent did issue, although the patent is not produced.[7] A patent issued on a military land warrant, under the law of a State, is held to be *prima facie* evidence that every prerequisite of the law has been complied with.[8] A copy of the final certificate of lands, granted to a patentee by the United States, and of an assignment indorsed thereon by the patentee, certified by a justice of the peace, who is certified to be such by the register of the land office, is not admissible in evidence.[9] Nor is a patent from a State, of lands sold as a swamp or overflowed lands, *prima facie* evidence as against a claimant under the government that such lands are swamp and overflowed.[10] A patent for United States land, which appears to have been signed by the president, countersigned by the commissioner of the general land office, and verified by the seal of that office, is admissible as evidence, without proof of its execution.[11] But a surveyor's having admitted an entry, or made a survey, or a patent having issued, in a certain name, is no proof that there is a person bearing that name.[12] Nor is the report of a surveyor, unaided by a certificate of survey or patent, sufficient to prove the land, described as belonging to a certain person, to have been in fact surveyed for him, and included in his patent.[13] The time when a certificate was returned to the land office is matter of fact, determinable by the jury.

[5] Stevens v. Martin, 18 Penn. St. 101.

[6] Short v. Wade, 25 Tex. 510.

[7] Willis v. Bucher, 3 Wash. (U. S.) 369.

[8] Bouldin v. Massie, 7 Wheat. (U. S.) 122.

[9] Scott v. Hancock, 3 Stew. & P. (Ala.) 44.

[10] Keeran v. Allen, 33 Cal. 542.

[11] Bowser v. Warren, 4 Blackf. (Ind.) 522.

[12] Finlay v. Humble, 2 A. K. Mar. (Ky.) 569.

[13] Rice v. Welch, 1 Litt. (Ky.) 74. Thus a petition to the judges of the land office by one A., with certain alterations made therein in the handwriting of a clerk of that office, since dead, stating when the certificate was

Sec. 200. Copies.

In most cases, where by statute certain instruments are required to be recorded in a certain manner, a copy thereof, duly certified by the proper recording officer, is admissible in evidence where the contents of the instrument becomes material; but although an instrument has been in fact recorded, yet unless it belonged to the class entitled by statute to be recorded its contents cannot be proved by copy,[1] although it is held in some of the cases that with other proof of the execution of the instrument a certified copy thereof may be evidence.[2] There are four classes of copies, to wit: 1st. Examplifications; 2d. Office copies; 3d. Examined copies; and 4th. Certified copies.

Exemplified copies are those which are certified under the great seal (State or national), and those which are certified under the seal of the court in which the record may be preserved. But even an exemplified copy is not admissible in evidence, unless the instrument is one which is required to be kept or recorded in the department of the government in which it is deposited. Thus an exemplified copy of private deeds is not admissible, and the same is true of any private document or instrument.[3] But an exemplification of any instrument, produced from the proper custody, is evidence. Thus, an exemplified copy of a commission from the government has been held to be evidence, although the seal has been lost.[4]

When the right to read an official copy is claimed under a stat-

returned, was not admitted in evidence to prove at what time it was returned, or to prove that it was returned before a certain period, as the party against whom the testimony is intended to operate did not derive any interest in the land under A. Hammond v. Warfield, 2 H. & J. (Md.) 151. In an action of ejectment by A. against B., a patent certificate to A.'s legal representatives, without other evidence, cannot be received in evidence, and such certificate is no evidence of title in A. Matingly v. Hayden, 1 Mo. 439. Upon issue joined whether A. could have procured a title from the United States to a certain tract of land located by him by virtue of a New Madrid certificate, it was held that a patent and certificate of survey to B. for the same tract is not admisible. Green v. M'Girk, 1 Mo. 498.

[1] Childress v. Cutter, 16 Mo. 24; N. Y. Dry Docks v. Hicks, 5 McLean (U. S.), 111; Miles v. Knatt, 12 G. & J. (Md.) 442; Rashin v. Shields, 11 Ga. 536; Thomas v. Grand Gulf Bank, 17 Miss. 201; James v. Gordon, 1 Wash. (U. S. C. C.) 323; Berry v. Matthews, 13 Md. 537.

[2] Webster v. Harris, 16 Ohio, 490; Carroll v. Norwood, 1 H. & J. (Md.) 167; Parnell v. Knox, 16 Ala. 364; Mitchell v. Mitchell, 3 S. & P. (Ala.) 81.

[3] Buller's N. P. 227.

[4] Beverley v. Craven, 2 M. & K. 140.

ute declaring such copy evidence, it must appear that all formalities prescribed by the statute have been strictly pursued.[5]

Indeed, it is held that an exemplified or certified copy of a sealed instrument, need not reproduce the seal. Indicating that there was a seal, by the letters " L. S." or the like is enough.[6]

A copy of an instrument, within the purview of the stamp act, made previous to the act, may be used in evidence without being stamped.[7]

The certificate of a copy from an official record, must be by the officer having the record in charge, and authorized to certify. A copy certified by a stranger or by an officer wholly unauthorized, cannot be received.[8]

It seems, however, that to certify copies is within the ordinary powers of a duly appointed deputy of the officer named by law to keep the charge of a record; and a copy certified by a deputy acting for his principal, is good.[9].

The certificate which is allowed to be read in evidence in lieu of the production of papers which have been recorded or deposited in a public office, *is a certificate to a copy of the instrument.* A certificate by the officer that certain facts appear by the records or papers on file in his office cannot be received under statutes authorizing the use of certified copies.[10]

An *office copy* is a copy made by an officer having the custody of the document in the same court; and in the same cause such a copy has all the force of the original.[11] Thus, an office copy of depositions in chancery are evidence in that court, but they would not be admissible in a court of law, without examination,[12]

[5] Smith v. United States, 5 Pet. (U. S.) 292; Crayton v. Munger, 11 Tex. 234; Butler v. Dunnagan, 19 Tex. 559; McDuffie v. Greenway, 24 id. 625; Dixon v. Thatcher, 14 Ark. 141; Smith v. Brannan, 13 Cal. 107; Brown v. Cady, 11 Mich. 536; Maxwell v. Light, 1 Call. (Va.) 117.

[6] Holbrook v. Nichol, 36 Ill. 161; State v. Bailey, 7 Iowa, 390; Hedden v. Overton, 4 Bibb (Ky.), 406; Compare Falcott v. Delaware Ins. Co., 2 Wash. (U. S.) 449.

[7] Montgomery v. Black, 4 H. & M. (Md.) 391.

[8] Schnertzell v. Young, 3 Har. & M. (Md.) 502; Woods v. Banks, 14 N. H. 101; State v. Clark, 24 N. J. L. 516; Devling v. Willamson, 9 Watts (Penn.), 311; Hockenbury v. Carlisle, 1 W. & S. (Penn.) 282.

[9] Hague v. Porter, 45 Ill. 318; Greason v. Davis, 9 Iowa, 219; Moore v. Farrow, 3 A. K. Mar. (Ky.) 41; Triplett v. Gill, 7 J. J. Mar. (Ky.) 438; Rives v. Rives, 4 id. 533.

[10] Draughan v. The Tombeckbee, 3 Stew. (Ala.) 54; Olven v. Boyle, 15 Me. 147; Maguire v. Sayward, 22 id. 230; English v. Sprague, 33 id. 440; Frute v. McDonald, 27 Miss. 610; Drake v. Merrill, 2 Jones L. (N. C.) 368; Barry v. Rhea, 1 Overt. (Tenn.) 345; Davis v. Loftin, 6 Tex. 489; Struthers v. Reese, 4 Penn. St. 129.

[11] Lucas v. Fulford, 2 Burr. 1179.

[12] Buller's N. P. 229.

except in the trial of an issue out of chancery;[13] and it is by no means certain that such copies are admissible, even in that case.[14] To illustrate the rule that office copies are only admissible in the same court and in the same cause, it may be said that when a sheriff is sued for a false return, an office copy of the writ and return, although in the same court, is not admissible, for the reason that the cause is a different one.[15] But in such cases the copies should be compared with the original by a person who can swear to their accuracy.

An *examined copy* is a copy of a document of a *public nature,* which is required to be kept, made by some person who can swear to its accuracy, or which has been compared with the original, word for word and line by line, by the witness who swears to its accuracy. What are public documents in the sense that an examined copy thereof is admissible does not clearly appear, and has never been accurately defined, but the term seems to include all documents in which the community at large is interested, and which it is desirable not to remove from their place of deposit.[16] The term would clearly include all records of any court whatsoever, and all registers of births, deaths and marriages; registers having reference to shipping and navigation, to trade and to the public health. The rule applies equally to such public registers kept abroad, as there is a presumption that the foreign authority in whose custody they are would not allow their removal to another country.[17]

An examined copy of a record or other document must be proved by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original.[18] And it is not necessary for the persons examining to exchange papers and read them alternately.[19] The copy must not contain abbreviations which do not occur in the original.[20] Where an examined copy is put in evidence some account should be given of the original record; thus, it ought to be shown that the record from which the copy was taken was seen in the hands of the proper officer, or was in the proper place for the custody of such records.[21]

[13] Highfield v. Peake, M. & M. 109.
[14] Burnaud v. Nerat, 1 C. & P. 578.
[15] Pitcher v. King, 1 C. & K. 655.
[16] Lynch v. Clerke, 3 Salk. 154.
[17] Lanesborough's Claim, 1 H. L. C. 510, n.; Abbott v. Abbott, 29 L. J., P. M. & A. 57.
[18] Reid v. Margison, 1 Camp. 469.
[19] Gyles v. Hill, 1 Camp. 471, n.; Rolf v. Dart, 2 Taunt. 52.
[20] R. v. Christian, C. & M. 388.
[21] Adamthwaite v. Synge, 1 Stark. 183; 4 Camp. 372.

In this country, as a rule, where a document is in the custody of an officer, who is required to keep it, a certified copy thereof made by him is admissible,[22] and this obviates to a large extent the necessity for examined copies, although in some of the States such certified copies are not received.[23]

A copy of a policy of insurance, proved to have been compared with the original register on the books of the insurance company, and notice given to produce the original cannot be read in evidence, but the register in the hands of the company should be exhibited, after proving the existence of the original policy.[24] Nor can a copy be received in evidence unless the witness producing it makes oath that he compared the copy with the original.[25] And generally a sworn copy is not evidence, if objected to.[26] A copy of articles of agreement, the authenticity of the original having been often acknowledged by the adverse party, may be admitted in evidence on proof of its being a true copy.[27] Sworn copies of a marriage contract, executed in the presence of the lieutenant-governor and Spanish commandant of upper Louisiana, with the certificate of the commandant that it was a copy of the original deposited among the archives of said territory, have been held not good evidence of the marriage.[28] Proof that a paper, offered as evidence in a cause, is a true copy of the original admitted to be lost, was held to be sufficient to authorize its going to the jury.[29] When a record has become illegible by lapse of time, the testimony of a witness who had examined and copied it while legible, is properly received to supply the defect.[30] An examined copy of an instrument which it is the duty of a public officer to record and give copies of, may be received in evidence, in any proper case, without proof of the original.[31]

Certified copies are those which are certified to be accurate by some officer who has the custody of the original, or of the records thereof, *and are only admissible, as a rule, where the original document is required by law to be recorded or kept in the office*

[22] Oakes v. Hill, 7 Pick. (Mass.) 442; United States v. Perchman, 7 Pet. (U. S.) 51; United States v. Johns, 4 Dall. (U. S.) 412.

[23] Hathaway v. Goodrich, 5 Vt. 65; Stephen v. Clements, 2 N. H. 390.

[24] United States v. Shearman, Pet. (U. S. C. C.) 98.

[25] Catlin v. Underhill, 4 McLean, 199.

[26] Fitzgibbon v. Kinney, 3 Harr. (Del.) 317.

[27] Stevenson v. Dunlap, 7 T. B. Mon. (Ky.) 134.

[28] Chouteau v. Chevalier, 1 Mo. 343.

[29] Bullit v. Overfield, 2 Mo. 4.

[30] Little v. Downing, 37 N. H. 355.

[31] Farrar v. Fessenden, 39 N. H. 268.

over which the person certifying the copy presides. In some of the States, even where by law a document is required to be recorded in a certain office, a certified copy thereof is held not to be admissible in evidence unless the statute makes it so, or a foundation is first laid for the admission of secondary evidence. But as in most of the States the rule is otherwise, and as the matter is one with which the practitioner in a given State is presumed to be familiar, it will not be practicable to refer to the cases or the instances in which this exception to the general rule is held.

An official copy duly exemplified or certified, and within the limits authorized by a statute, is received as *prima facie* evidence of its contents, and of all the circumstances necessary to authorize the copy to be used without collateral proof.[32] And the person who made or examined the copy is not excluded from the privilege of using it in evidence.[33] Statutes enabling a party to use official copies of writings in evidence, do not impair the effect of the originals if they can be produced.[34] Nor are they exclusive of the common-law rules allowing the execution and contents of deeds to be proved by secondary evidence.[35]

Sec. 201. Official Certificates.

Where the statute provides that a certified copy of any instrument required by law may be introduced in evidence, such certified copy is insufficient to establish execution and delivery of the original when denied.[1] Copies of deeds recorded are admissible to prove a claim of title without proof of execution and delivery where the deeds belong to strangers.[2]

A certificate of a public officer in another State is not admis-

[32] Warner v. Hardy, 6 Md. 525; McCauley v. State, 21 id. 556; Bryan v. Wear, 4 Mo. 106; Snyder v. Bowman, 4 Watts (Pa.), 133.

[33] Lynde v. Judd, 3 Day (Conn.), 499; Ratcliffe v. Trimble, 12 B. Mon. (Ky.) 32.

[34] Dobbs v. Justice, &c., 17 Ga. 624; Goodwyn v. Goodwyn, 25 id. 203; Vose v. Manley, 19 Me. 331; Day v. Moore, 13 Gray (Mass.), 522; King v. Kenney, 4 Ohio, 93; Sheehan v. Davis, 17 Ohio St. 157; Miller v. Hale, 26 Penn. St. 432.

[35] Loftin v. Nalty, 24 Tex. 555; United States v. Lamb, 12 Pet. (U. S.) 1.

[1] Official bond, Craw v. Abrams (Neb., 1903), 97 N. W. 296.

[2] Colchester Sav. Bank v. Brown, 75 Conn. 69, 52 A. 316; Frazee v. Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391. In Louisiana copies made by the recorder from the conveyance book in his office are considered copies of copies and inadmissible to prove title to real estate. Ruddock Cypress Co. v. Peyret, 113 La. —, 37 So. 858.

sible unless made so by the statute of the forum or by a United States statute.[3]

A certified copy from the public records of the registrar of births, deaths and marriages is admissible as to the cause of death.[4]

In a recent case in Rhode Island a copy made in 1857 of the ancient records of a town which were wasting away, which copy had been used for nearly 50 years as the town record, was held admissible in evidence as it was said that every presumption should be made in favor of its correctness.[5] The office of commissioner for United States courts was created by 29 Stat. 184 and in certain cases he is a *quasi* judicial tribunal, therefore *his certified* copy of the record he is bound to keep is evidence of the truth of the matter therein cited and need not otherwise be proven.[6] The certificate of the secretary of State of the general government under his seal of office, that a particular person had been recognized by the department of State as a foreign minister, has been received as full evidence of his official standing,[7] on an indictment for arresting the person so accredited contrary to an act of congress. So on an indictment for an assault and battery upon an attache and secretary to the legation of Spain, the certificate of the secretary of State was held the highest and the best evidence of the official character of the complainant.[8] In the latter case the certificate was dated after the assault, and stated that Mr. Feronda, charge d'affaires of Spain, had introduced the complainant as a gentleman attached to the legation, and performing the duties of secretary of legation.[9]

But the certificate of an American consul, residing in a foreign country, attesting the official character of a person there, is not evidence, because it is not within the range of consular duties.[10]

[3] James v. James, 35 Wash. 650, 77 Pac. 1080.

[4] Hennessy v. Metropolitan Life Ins. Co., 74 Conn. 699, 52 A. 490; McKinstry v. Collins, 74 Vt. 147, 52 A. 438. Such evidence is received on account of its general trustworthiness and the great inconvenience entailed on summoning officers continually as to such matters. Murray v. Supreme Lodge N. E. Order of Protection, 74 Conn. 715, 52 A. 722.

[5] N. Y., N. H. & H. R. R. Co. v. Horgan, 25 R. I. 408, 59 A. 310.

[6] Ramsey v. Flowers (Ark.), 80 S. W. 147.

[7] United States v. Banner, 1 Bald. (U. S. C. C.) 234.

[8] United States v. Liddle, 2 Wash. (U. S. C. C.) 205.

[9] United States v. Ortega, 4 Wash. (U. S. C. C.) 531.

[10] Stein v. Stein's Curator, 9 La. 277, 281; Las Caggas v. Larionda's Syndics, 4 Mart. (La.) 283; Church v. Hubbart, 2 Cranch (U. S.), 236.

But under the statute of New York, the acknowledgment of a power of attorney purporting to have been taken before a consul of the United States, resident in a foreign country, certified by him in the proper form and authenticated by his official seal, is sufficient proof of the execution of the power without any evidence *aliunde* of the genuineness of the signature or seal.[11]

Where the official character of a notary abroad is sought to be proved, a certificate under the national seal of the foreign country, attesting that the person certifying the instrument is a notary by regular appointment, would be evidence.[12] The notary's certificate under seal proves itself.[13]

In New Hampshire, it has been held that the certificate of the county clerk in New York, under the seal of the county, is competent evidence to show that an individual, who had acted as magistrate in taking a deposition in the latter State, was, in fact, a justice of the peace. The decision goes upon the ground that the evidence of the due appointment of justices in New York is found in the clerk's office of the respective counties, and that the clerk of the county in which the justice resides is the proper certifying officer to these facts.[14]

The certificate of an officer, by way of attesting an independent fact, and not to authenticate copies, etc., is hardly ever admissible, unless rendered so by positive statutory enactment. Accordingly, the certificate of the secretary of North Carolina, that a grant had not been recorded in his office, was held in Tennessee to be no evidence. The business of a keeper of records, say the court, is not to certify the official order of papers from which official facts are inferred. The general scope and substance of the certificate might more properly furnish matter for a deposition.[15] On the same principle, the certificate of a clerk, containing a historical account of the proceedings of a court, has been held inadmissible; he should certify a copy.[16] So, too, of certificates to prove the loss of papers, which, it is said, must be shown in the ordinary way of proving other facts.[17]

[11] St. John v. Creel, 5 Hill, 573.

[12] Las Caggas v. Larionda's Syndics, *ante*.

[13] Bank v. Gray, 2 Hill (N. Y.), 227.

[14] Dunlap v. Waldo, 6 N. H. 450.

[15] Ayers v. Stewart, 1 Overt. (Tenn.) 221.

[16] Barry v. Rhea, 1 Overt. (Tenn.) 345; Wilcox v. Ray, 1 Hayw. (N. C.) 410.

[17] Robinson v. Clifford, 1 Wash. (U.

In New York, it is provided by statute that when any officer, to whom the legal custody of any document or paper shall belong, shall certify under his official seal that he has made diligent examination in his office for such paper, and that it cannot be found, such certificate shall be presumptive evidence of the facts so certified in all causes, matters and proceedings, in the same manner and with the like effect as if such officer had personally testified to the same, and copies of all papers filed with the county clerk are by statute rendered evidence in all courts, when certified by him in like manner as if the originals were produced; and under the statute a certified copy of an oath of office so filed is admissible in evidence in a suit by the officer for his services.[18] In relation to chattel mortgages, the clerk's certificate is rendered evidence of the filing; but the mortgage must be produced and proved by common-law evidence; the certificate of the town clerk is not evidence that the paper certified as such is a copy.[19] The agent selling under it does not require an exact copy.[20] The general principle as to certificates of an independent fact seems to have been acted on in Vermont in a case where the defendant, in ejectment, in stablishing a vendue title arising out of the collection of special taxes, produced a certificate from the clerk stating at what sum the committee's account of their expenditure of tax, prior to the sale, was allowed; and it was held not admissible, and that a certified transcript of the record of the account kept by the clerk, and of the allowance upon the same, was the only legitimate evidence.[21] So, in North Carolina, where the clerk was authorized by statute to certify the record of certain bonds, and he certified that "the following, and none other, were the bonds," etc.; held, that what the clerk had attested as a record was admissible, but that which he certified, not as a record but a fact, viz., that no other bonds were given, was not evidence, because he did not do it officially.[22] In Ohio, where, in making title under a judgment and execution, the execution, as certified by the clerk, varied from the

S. C. C.) 1; Wilcox v. Ray, 1 Hayw. (N. C.) 410. Though this is otherwise in Pennsylvania. See Ruggles v. Alexander, 2 Rawle (Penn.), 232.

[18] Devoy v. Mayor, &c., of New York, 35 Barb. (N. Y.) 264.

[19] Bissell v. Pearce, 28 N. Y. 252. See, also, Fellows v. Hyring, 23 How. Pr. (N. Y.) 230.

[20] Dane v. Mallory, 16 Barb. (N. Y.) 46.

[21] Coit v. Wells, 2 Vt. 318.

[22] Governor v. McAffee, 2 Dev. (N. C.) 15. This doctrine prevails in Massachusetts (Oakes v. Hill, 14 Pick. [Mass.] 442); and in New York (Wolfe v. Washburn, 6 Cow. [N. Y.] 261, 265.)

judgment; held, that though the fact of such execution having issued on the judgment produced, might be shown, notwithstanding the variance, yet it could not be established by the clerk's certificate. His certificate is good so far as it relates to matter of record, or copies of papers filed in his office. But he cannot certify independent facts within his knowledge; to prove such things he should be sworn.[23]

In general, where an officer is not required by law to certify his doings, and he does so, his certificate is not evidence.[24] Both of the cases cited in the last note were instances of certificates upon process by way of return, when no such return was authorized. In those cases where the law makes it the duty of an officer to make a return, and holds him responsible for its truth, it is generally evidence. Where an officer is authorized by statute to certify, and his certificate is rendered evidence, the statute is not to be so construed as to authorize him to certify to what he must necessarily derive from mere hearsay, unless the legislature have so expressly enacted.[25] In such cases, the certificate is not to be

[23] Bank of the United States v. White, 1 Wright (Ohio), 51, 52.

[24] Hathaway v. Goodrich, 5 Vt. 65; Stephen v. Clements, 2 N. H. 390.

[25] See Johnson v. Hocker, 1 Dall. (U. S.) 406; Stewart v. Allison, 6 S. & R. (Penn.) 324, 329.

Under this rule, in North Carolina, where the certificate of an adjutant-general is made evidence by statute of certain delinquencies in not making returns, it was held that it was not evidence of such delinquencies as consisted in neglecting to make returns to other officers, but only of such as related to returns to be made to himself, because as to the former he could have no official knowledge, and must rely entirely upon hearsay. Governor v. Jeffreys, 1 Hawks (N. C.), 207. See Governor v. Bell, 3 Murph. (N. C.) 331. Upon the same principle, a law of congress, authorizing transcripts of treasury accounts to be received as evidence, was held to extend to such accounts only as arose through the direct official dealings of the department, and an account for moneys received by a deputy commissary, from a deputy quartermaster, to the use of the United States, is not within the provision. "An account stated at the treasury department," say the court, "which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by the books. In these cases, the officers may well certify, for they must have official knowledge of the facts certified. But where moneys come into the hands of an individual, as is the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established, not by the treasury statement, but by the evidence on which that statement was made." United States v. Buford, 3 Pet. (U. S.) 12, 29. And where an officer's certificate is made evidence, by statute, of certain facts, he cannot extend its effects to others by incorporating them with those to which he

rejected altogether, *but such parts as are pertinent and official* may be read.

The certificate must be by the proper officer. The certificate of the register of the treasury department of the general government, under his hand, was offered to show that certain receipts, copies whereof were annexed, were on file in his office. This was accompanied by the certificate of the secretary of the treasury, under the seal of the department, that the person signing the same was register; yet it was held not evidence, for although the register might have the custody of the papers, yet he is not authorized by law to certify them.[26] The certificate should, in general, be by the officer who has at the time the legal custody of the evidence.

is authorized to certify. Accordingly, in North Carolina, under the statute above referred to, in an action brought to recover a penalty imposed upon a militia officer for delinquency in not making a return, it was held that the adjutant-general's certificate could not reach beyond the fact of the delinquency, and though he had also certified that the defendant was an officer, yet the court decided that the certificate was no evidence of this, but that it must be proved independently. Governor v. Bell, 3 Murph. (N. C.) 331. So, though the certificate of the inspector of ashes, in the city of New York, was made presumptive evidence by statute of the facts contained in it, yet it was held that this must be understood in reference to those facts to which the statute has authorized him to certify, viz., the fact of inspection, the quality, weight, tare, crustings, scrapings, etc. These he may certify, but not as to the title. In respect to the latter, he has no power to certify, and his certificate will not be regarded as evidence on questions relating to it. Williams v. Merle, 11 Wend. (N. Y.) 80, 82.

Thus, in an action on a bond, a certificate of an officer was introduced, which, by the local law, was competent evidence of payment, but which also stated that a tender had been made to the plaintiff in the suit in the presence of H. and R., and that he had refused to receive it; M'KEAN, C. J., delivering the opinion, said: "We certainly should not permit Mr. S. (the certifying officer), if he were here present, to swear that he was told that such persons were present at the tender; but the question is, whether, having certified what he ought not to certify, the whole ought to be rejected. We think it ought not. The papers should be admitted to prove that payment was made agreeably to the act of assembly, at the time mentioned. All the rest may be struck out; or indeed, only so much as goes to that point be read and admitted to be proved." He accordingly read to the jury so much as related to the receipt, and suppressed the rest. Johnson v. Hocker, 1 Dall. (Penn.) 406. See Wolfe v. Washburn, 6 Cow. (N. Y.) 265. Certificates are to be confined, in their operation and effect, to the special purposes contemplated by the law authorizing them. Thus, in New Jersey, a certificate of surveyors of highways, and in the New York phrase, "fence viewers," adjudging where the parties therein mentioned should set their partition fence, were held not admissible evidence on the question of title. The order of the surveyors is intended by statute for fixing the place of a temporary partition fence until the place shall be legally settled, and to enable the party making the fence to recover from the other his just proportion of the expense. Corlis v. Little, 12 N. J. Eq. 229.

[26] Bleecker v. Bond, 3 Wash. (U. S. C. C.) 529.

Thus, to prove certain passengers, imported by the defendants into Pennsylvania, to be convicts, and to have undergone punishment in the Spiel-House of Hamburgh, in Germany, a written report was returned with a commission issued in the cause, containing a list of the convicts in the Spiel-House, which report appeared to have been signed by the *late directors* of the Spiel-House. The court held the paper as not competent evidence. "It is not," said they, "an *official* paper certified by the proper officers, who at the time had the custody of the Spiel-House or of the books. They style themselves *late* directors.[27]

All certificates, receipts, accounts stated, or other papers framed by private persons, stand upon the footing of mere naked hearsay, and they are never allowed to possess any intrinsic force as evidence against third persons, and cannot be received to affect the rights of a party.[28] So the certificate of an attorney, to prove that a judgment had been obtained on certain notes, is held inadmissible.[29]

Certain receipts of public officers have made an exception. In Louisiana, the receipt of the receiver of public moneys for government lands has often been held sufficient to show that the title is out of the government.[30] Where land has been sold for taxes, a receipt of the treasury for the surplus bond required of the purchaser by the act of assembly, is evidence, in favor of the purchaser, of the fact that such bond had been executed and delivered.[31] Payment for land, made to the officers of the land office, may be proved in that State by the officer's receipt. On the same principle, it has been usual to admit the receipts or certificates of deputy surveyors for their fees and expenses of survey. But a certificate of the latter kind, given after the deputy had ceased to hold the office, attesting the fact of his having received the fees, etc., at *a previous* time, and not at the time the money was paid, is not evidence to affect third persons.[32]

[27] Jones v. Ross, 2 Dall. (Penn.) 143.

[28] Paull v. Mackey, 3 Watts (Penn.), 110; English v. Hannah, 1 id. 424; Cutbush v. Gilbert, 4 S. & R. (Penn.) 551, 555, 556.

[29] Tuthill v. Davis, 20 Johns. (N. Y.) 285.

[30] Newport v. Cooper, 10 La. 155; Goddard v. Glodinger, 5 Watts (Penn.), 209; Cluggage v. Swan, 4 Binn. (Penn.) 150.

[31] Fager v. Campbell, 5 Watts (Penn.), 287.

[32] Cluggage v. Swan, 4 Binn. (Penn.) 150.

Thus, to prove that the governor of the island of St. Thomas refused a captain's petition for leave to take away the cargo of a vessel, the gov-

In respect to foreign certificates, they have occasionally been admitted, as well as rejected, upon grounds from which it is difficult to deduce any rules of a very general nature. Where it is probable that the officer of another country would not make a deposition, his certificate has been received.

Where the statute allows certain facts to be proved by the certificate of an officer, the certificate must comply with the requirements of the statute in form and substance.[33] When the certificate is made according to law, as required in the organization of banking associations, and acknowledged and recorded, it becomes evidence of the organization.[34] So the certificate of the organization of a transportation company is conclusive evidence of the matters therein stated pursuant to the requirements of the statute.[35] No

ernor's certificate, given at the time of the petition, was offered; it was not under seal, but was proved to be in his handwriting, and the court admitted it, saying: "The certificate is of an official act, given at the time, by which it appears the captain petitioned for leave to take away the cargo, which the governor refused. We know no way by which that fact could be better proved than by this certificate, unless the deposition of the governor had been taken, which it is not to be supposed he would have consented to give. This is very different from evidence of matters not official, in which latter case such certificate could not be admitted. United States v. Mitchell, 3 Wash. (U. S. C. C.) 95, 96. In another case, the certificate of the collector of Havana was offered; it was under his official seal, and stated the arrival of a certain ship at that place for the purpose of watering; that, to effect this object, the captain was obliged to present himself to the intendent-general of the royal armes and treasury, by whom the ship's cargo was *decreed* to be sold, on account of the scarcity, at that place, of the articles of which it consisted. It appeared that the collector was authorized to grant such a certificate, by a local law of Cuba, and indeed that he alone could do so; but the court denied that it was evidence. "We admit," say they, "it is an authentic instrument; but still it is only an *ex parte* certificate of a fact, which the officer was authorized to certify; but is not the best evidence which the case admits of, because the deposition of the officer might have been taken; and it was important for the defendant to have had the privilege of cross-examining, particularly for the purpose of eliciting the true cause of the order of sale." Wood v. Pleasants, 3 Wash. (U. S. C. C.) 201, 203. WASHINGTON, J., added, that although it appeared that the Spanish verb, which in this certificate was translated "decreed," means also "ordered, resolved, determined," and does not necessarily imply that it was in writing; yet that the decrees of every civilized country, in respect to the sale or disposition of property, ought to be presumed written until the contrary appears. If, he said, it had appeared that the decree was not in writing, evidence of its purport, taken in a proper manner, might be received; or if it had appeared that the officer who gave the certificate would not be permitted, by the government of Havana, to give a deposition, inferior evidence, in that case, might be received.

[33] Rogers v. Jackson, 19 Wend. (N. Y.) 383.

[34] Burrows v. Smith, 10 N. Y. 550.

[35] Western Trans. Co. v. Scheu, 19 N. Y. 408.

Thus, the inspector's certificate un-

greater effect, however, will be given to the certificate than what the statute evidently contemplated.

Where public officers are authorized by law to certify to certain facts, their certificates to those facts are competent evidence thereof.[36] Thus, the certificate of a public officer, of acts done in the execution of his duty, is not to be impeached by the evidence of a single witness;[37] but extraofficial certificates, made by an officer, are not admissible in evidence.[38] But a certificate of a public officer can only authenticate copies. It cannot prove a fact as the non-appearance of a certain name on the records.[39] An officer of one State has no power to certify to the official character of a person who holds his appointment under another State.[40] The certificate of the register of births and deaths for the parish of Orleans is held to be a legal document, creating of itself a *prima facie* presumption of the death of a party.[41] Where an act of the legislature directs that the certificate of a public officer shall be evidence, a paper produced with his name will be *prima facie* evidence, unless the name is proved not to have been signed by him.[42] But an official certificate is evidence only so far as the matter certified comes within the official duty or cognizance of the officer,[43] and the mere statement of a fact in writing, by a person not acting in any official

der section 34 of the plank-road act showing the completion of the road, does not estop the State from inquiring into the manner in which the road has been constructed. People v. Fishkill & B. Plank Road Co., 27 Barb. (N. Y.) 445. Such companies were organized by the filing of articles of association and were allowed to erect toll-gates and collect tolls when they had completed a certain number of consecutive miles of the road, as shown by the inspector's certificate duly filed; this certificate properly drawn was made the evidence of the fact certified and conclusive between the road and individuals. The Hammondsport, &c., Plank Road Co. v. Brundage, 13 How. Pr. (N. Y.) 448. So where a village corporation was authorized to issue its bonds and negotiate them for a railroad corporation after a certain amount of its capital stock, $500,000, should be subscribed, such subscription to be certified by commissioners and their certificate filed; it was held in favor of a *bona fide* holder of one of the bonds thus negotiated, that the certificate thus made was conclusive of the fact certified. Bank of Rome v. Village of Rome, 19 N. Y. 20. So the appointment of trustees of a concealed, absconding or non-resident debtor is held conclusive evidence under the statute of the regularity of previous proceedings. Wood v. Chapin, 13 N. Y. 509.

[36] Levy v. Burley, 2 Sumn. (U. S.) 335; Guno v. Jamis, 6 Mo. 330.

[37] Brown v. Galloway, Pet. (U. S. C. C.) 291.

[38] Woods v. Nabors, 1 Stew. (Ala.) 172.

[39] Martin v. Anderson, 21 Ga. 301.

[40] O'Bannon v. Paremour, 24 Ga. 489.

[41] Succession of Jones, 12 La. Ann. 397.

[42] Prather v. Johnson, 3 H. & J. (Md.) 487.

[43] Newman v. Doe, 5 Miss. 522.

capacity, is not a certificate, and the calling it by that name cannot alter its character or clothe it with official solemnity.[44] The certificate of an officer, when by law evidence for others, is competent evidence for himself, provided he was, at the time of making it, competent to act officially in the matter to which it relates.[45] The certificate of a governor of a foreign island, registered in the admiralty at Martinique, relative to an order issued by him, is held evidence to go to a jury;[46] so the official certificate of the secretary of the government of Florida during the dominion of Spain over the territory, after evidence that no originals could be found in the proper office, was held sufficient evidence of the copies of the petition and decree of the governor, no proof having been given to impair or contradict the force of the same.[47] The certificate of the governor of St. Thomas (the signature being proved), without a seal, given at the time the captain petitioned for leave to depart with his cargo, that such petition was refused, was held to be an official act, by a person who, it is probable would not give a deposition, and is different from matters not official, and might be read in evidence.[48]

The certificate of the secretary of an incorporated company, bearing its seal, affords *prima facie* evidence of the facts therein stated. The court is bound to presume, from such certificate, that legal notice was given to the stockholders of the company of a meeting of which they were entitled to be notified.[49] So the certificate of a commissioner for Louisiana of the official capacity of the clerk of a county court in another State, affords *prima facie* presumption of the legal authority of the clerk to do what he is shown to have done, to wit, to receive the acknowledgment of a deed.[50] A secretary of a banking corporation is not a certifying officer, and therefore his copies must be sworn to.[51] So the certificate of the clerk of a religious society that a person had ceased to be a member of such society is not legal evidence of the fact.[52] So in an action to recover for work done in building a highway, in which it

[44] Runk v. Ten Eyck, 24 N. J. L. 756.
[45] McKnight v. Lewis, 5 Barb. (N. Y.) 681.
[46] Bingham v. Cabot, 3 Dall. 19.
[47] United States v. Acosta, 1 How. (U. S.) 24.
[48] United States v. Mitchell, 3 Wash. (U. S.) 95.
[49] New Orleans, &c., R. R. Co. v. Lea, 12 La. Ann. 388.
[50] Tucker v. Burris, 12 La. Ann. 871.
[51] Hallowell, &c., Bank v. Hamlin, 14 Mass. 178.
[52] Oakes v. Hill, 14 Pick. (Mass.) 442.

is material to prove that the work was done in good faith, a certificate delivered by the chairman of the county commissioners to the plaintiff, that the highway had been graded and worked to their acceptance, is incompetent.[53] An unsworn certificate by an engineer, to a paper purporting to be a copy of estimates made by his predecessor in office, of the number of feet in certain railroad bridges, is not admissible in an action upon the contract to recover the price for building such bridges.[54] In New Hampshire, a surveyor's return of his doings, upon a warrant for the collection of highway taxes, is held not to be competent evidence to be offered to a jury to prove the facts stated in his return, the statute not making his warrant a returnable process.[55] But the certificate of the proper recording officer is competent evidence of the fact that an instrument to which it is attached has been recorded as therein certified.[56] A collector of taxes is a public officer to whose official acts credit should be given; his duplicate, and an entry made therein by him of the payment of a tax, is good evidence of the fact of payment, independent of the oath of the collector himself.[57] So a certificate of one who officiated as mid-wife at the birth of one whose minority is in issue, is relevant; and if the parties agree to waive the oath and cross-examination, it is also competent evidence, when connected with other evidence to the same point.[58] In South Carolina, the sufficiency of the security furnished by a guardian appointed out of the State must be proved by the examination of witnesses; and the certificate of the officer by whom the guardian was appointed is not sufficient.[59] In Virginia, an auditor's certificate of forfeiture of land for non-payment of taxes, being a paper which he is authorized by law to make, and being made in the customary form, proves itself.[60] A genealogical table, certified under the seal of a foreign officer, is not evidence.[61] A letter from the land commissioner, stating that certain entries are good, and others bad, is not evidence of anything, except the commissioner's private opinion, and is inadmissible.[62] So a letter

[53] Reed v. Scituate, 7 Allen (Mass.) 141.
[54] Langford v. Sanger, 35 Mo. 133.
[55] Davis v. Clements, 2 N. H. 390.
[56] Ferguson v. Clifford, 37 N. H. 86.
[57] Lewisburg v. Augusta, 2 W. & S. (Penn.) 65.
[58] Beates v. Retallick, 23 Penn. St. 288.
[59] Exp. Copeland, Rice Ch. (S. C.) 69.
[60] Usher v. Pride, 15 Gratt. (Va.) 190.
[61] Banert v. Day, 2 Wash. (U. S.) 243.
[62] Jeanes v. Lawler, 33 Ala. 340.

of the State auditor in reference to matters of banking, etc., is not of itself evidence; that officer is required to keep a seal, and his official writings, etc., can only be properly authenticated by the use of it.[63] In Indiana, under a statute which provided that the sworn certificate of a corporation clerk to an extract of the records, should be admissible, it was held that the statute referred only to the admissibility of the copy, not to its effect when admitted, and, therefore, if any unsworn certificate be admitted without objection, it is as effective as if sworn to.[64] The indorsement and signature of the treasurer being expressly authorized and required on county warrants, by statute, such writing is competent evidence of the fact stated or certified in such indorsements.[65] A certificate of publication, signed by the editor only, is not proof of publication.[66]

Sec. 202. Certificates by Executive Officers.

"Official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts." So in a suit on the bond of a government contractor an official finding by the postmaster general based on official reports to him, that the principal is a "failing contractor," is *prima facie* evidence of the facts contained in the report.[1] But this rule is limited to such statements in official documents as the officers are bound to make in the regular course of official duty. The statement of extraneous or independent circumstances, however naturally they may be deemed to have a place in the narrative, is no proof of such circumstances.[2] The certificate of the librarian of congress that copies of a copyrighted book were received as required by law is competent although not under seal.[3] A certificate of the secretary of State, stating the practice in his office with regard to the time of affixing the seal of the State to warrants, is no evidence to show the time at which

[63] Morgan County Bank v. People, 21 Ill. 304.

[64] Smith v. Indiana, &c., Railway Co., 12 Ind. 61.

[65] Clark v. Polk County, 19 Iowa, 248.

[66] Hay v. M'Kinney, 7 J. J. Mar. (Ky.) 441.

[1] United States v. McCoy, 193 U. S. 593, 601, 24 S. Ct. 528.

[2] United States v. Corwin, 129 U. S. 381, 9 S. Ct. 318.

[3] Belford v. Scribner, 144 U. S. 488, 505, 12 S. Ct. 734.

such seal was annexed;[4] nor is the certificate of the register of the treasury department, under his hand, that certain receipts, of which copies are annexed, are on file in his office, with a certificate of the secretary of the treasury, under the seal of that department, that he is the register, evidence. It must appear, not only that the officer who gives the certificate has the custody of the papers, but that he is authorized by law to certify them, and the register is not so authorized. A sworn copy should be produced.[5] And although the auditor's report of a balance due from a person accountable for public money is a guide to the comptroller as to the amount to be sued for, it is not evidence, for the court, of the debt.[6] The seal of the treasury department of the United States, and the signature of the secretary, are sufficient evidence to authenticate the official acts of the secretary in a State court.[7] The certificate of the secretary of State that a certificate, required by the statute relative to the formation of corporations, has not been filed in his office, is not evidence of that fact;[8] but a certificate of incorporation from the office of the secretary of State is admissible, although the original date has been erased by the secretary, and the true date inserted.[9] In a suit on a promissory note given in consideration of the assignment of a patent right, the defendant offered the certificate of the commissioner of patents, under his seal of office, stating that no such patent had been issued, and it was held that such evidence was inadmissible.[10] A certificate of a secretary of State, that a certain grant is not recorded in his office, is not admissible evidence in an action of trespass to try title to the land mentioned in the grant.[11] A letter of the postmaster-general was read without objection to prove defaults in executing a contract; but a certificate of the postmaster-general to rebut this, being objected to, was held not competent.[12] Nor is a note of the secretary of State appended to an act of the general assembly, as published in pamphlet form, stating that the act was published in certain papers at a given date, evidence of the fact.[13] On a

[4] Brown v. Galloway, Pet. (U. S. C. C.) 291.
[5] Bleecker v. Bond, 3 Wash. 529.
[6] United States v. Patterson, Gilp. 44.
[7] White v. St. Guirons, Minor (Ala.), 331.
[8] Cross v. Pinckneyville Mill Co., 17 Ill. 54.
[9] Johnston v. Ewing, &c., University, 35 Ill. 518.
[10] Stoner v. Ellis, 6 Ind. 152.
[11] Ayres v. Stewart, 1 Overt. (Tenn.) 221.
[12] Wilkinson v. Jewett, 7 Leigh (Va.), 115.
[13] Allen v. Dunham, 1 Greene (Iowa), 89.

motion by a principal sheriff against his deputy, for a failure to account for a part of the revenue, the auditor's certificate of the amount of taxes is admissible evidence.[14] So the certificate of the treasurer is admissible evidence to prove the indebtedness of the collector of the State tax, although the clerk of the county commissioners gave testimony that it did not appear from their books that any tax was levied during the years that the collector was charged with taxes on the books of the treasury.[15] A constable's return of his service of an order of notice issued by a city council, under an ordinance of the city, is competent evidence, supported by his testimony that he has no doubt of its truth, although he has no recollection of the fact of service.[16] But the certificate of a sheriff, who has sold land for taxes, of his having posted a certain advertisement at a certain time and place. is inadmissible.[17]

Sec. 203. Certificates by Clerks.

A municipal ordinance may be proved by a copy certified by the city clerk as it is a public record and falls within the rule that public records may, independent of statute, be proven by copies certified by the officer having such records in charge. A certificate of city records signed by the clerk to the mayor and council of the city may be proper where the clerk describes himself as "collector of council" as any description is sufficient which identifies the person who acts in that capacity and as such has custody of the official records of the city.[2] The certificate of a county clerk, showing that a certain person was not a justice of the peace at the date of an acknowledgment, purporting to have been taken by him, is competent, but not conclusive evidence of such fact.[3] So the certificate of a town clerk that a claim for medical services rendered to a pauper had been presented to the board of trustees, and was by the board declared to be correct, and recommended to be paid, was held to be admissible evidence, but not decided to be sufficient.[4]

A certificate of a clerk of court sufficiently identifies the record

[14] Johnson v. Thompson, 4 Bibb (Ky.), 294.
[15] Crane v. State, 1 Md. 27.
[16] Hildreth v. Lowell, 11 Gray (Mass.), 345.
[17] Wells v. Burbank, 17 N. H. 393.
[1] Younglove v. Knox, 44 Fla. 743, 33 So. 427; Selma St. & Suburban Railway Co. v. Owen, 132 Ala. 420, 31 So. 598.
[2] Anderson v. Blair, 121 Ga. 120, 48 S. E. 951.
[3] Ross v. Hole, 27 Ill. 104.
[4] Fayette County v. Chitwood, 8 Ind. 504.

referred to where the record is attached to the certificate although on a separate sheet of paper.[5] Under a statute requiring the authentication of a foreign judgment by the certificate of a judge and also by the clerk of the court a certificate signed by a judge alone is sufficient where he is also the clerk.[6] A certificate of the clerk of the court is insufficient to impeach his record entry.[7] So if full proof is demanded to support a claim against an estate, the certificate of the clerk of the county court, stating that a note for the sum claimed, in favor of the claimant and against the deceased, was deposited in his office, and the *ex parte* deposition of his successor, that no such note could be found in the office after diligent search, are not sufficient to establish it.[8] But the certificate of the clerk of the court of errors is evidence of the reversal of a judgment,[9] and the certificate of the clerk of the circuit is sufficient evidence that a cause was not tried at the circuit.[10] A certificate that certain persons were appointed inspectors of elections, found in the town clerk's office, proved to be in the handwriting of a former town clerk, and signed by the clerk, supervisor, and a justice of the town, and filed by a former town clerk, is admissible evidence.[11] But the certificate of a town clerk, that a person has not conveyed land, is not evidence of that fact.[12] The certificate of a town clerk, on a deed, of the time when it was received into his office, pursuant to the statute, is only *prima facie* evidence of the facts recited in the certificate, and may be contradicted by parol proof.[13]

Sec. 204. Certificates by Judicial Officers.

The certificate of a magistrate of the acknowledgment of a deed is sufficient to admit in evidence, though it is not under seal;[1] and the same is true as to a certificate of a magistrate that an oath required by law was taken, although the oath as certified varies in form from that prescribed by law.[2] The certificate of a judge of

[5] Bartholomew v. Green (Iowa, 1905), 102 S. D. 777.
[6] Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.
[7] Holmes v. Budd, 11 Iowa, 186.
[8] Young v. Mackall, 4 Md. 362.
[9] Hoy v. Couch, 6 Miss. 188.
[10] Wright x. Mungy, 6 Johns. (N. Y.) 286.
[11] People v. Cook, 14 Barb. (N. Y.) 259.
[12] Hill v. Bellows, 15 Vt. 727.
[13] Bartlett v. Boyd, 32 Vt. 256.
[1] Fellows v. Pedrick, 4 Wash. (U. S.) 477.
[2] Rose v. Kennedy, 1 Cranch (U. S. C. C.), 29.

probate is not admissible to show who are the heirs of a deceased person.[3] The official certificate, or the testimony of the officer who administered the oath required by law to road viewers, is more authentic that the mere statement in the report of such viewers that they had been duly sworn.[4] In an action upon a jail bond, the certificate of the justices of the quorum, that the execution creditor was notified according to law, is conclusive evidence of that fact.[5] The certificate of a judge of probate, or of the clerk of the county court, is not competent evidence to show that a person is a public administrator. Those officers can only certify to the correctness of copies of records of their several courts, showing their appointment. A certificate by a surrogate, of facts known to him by inspection of his office records, is not evidence. Where the certificate is made as to an official act, it seems that it is admissible, although made after the close of the officer's term of office.[7] Thus in trespass for selling property by virtue of an execution, the certificate of the justice of the peace who rendered the judgment and issued the execution was held evidence, as well for himself as for the plaintiff in the execution, though such certificate was granted after the expiration of the office of the justice.[8]

Sec. 205. Notarial Certificates.

It will be presumed in a paper sworn to before a notary that the notary has complied with the statute and that the inscription upon his seal speaks the truth and that the venue set out in his jurat is correct,[1] and where a notary's certificate of acknowledgement of a deed is sought to be impeached and the presence of the officer, the presence of the instruments themselves, the presence of the grantors for signature and the signing of the papers then and there by them are shown the notary's certificate of acknowledgment is not open to impeachment in the absence of fraud or duress by proof that the grantors did not in fact acknowledge the instruments.[2] But the notary's certificate is said

[3] Greenwood v. Spiller, 3 Ill. (2 Scam.) 502.
[4] Dollarhide v. Muscatine County, 1 Greene (Iowa), 158.
[5] Black v. Ballard, 13 Me. 230.
[6] Littleton v. Christy, 11 Mo. 390.
[7] Armstrong v. Boylan, 4 N. J. L. 76.
[8] Maynard v. Thompson, 8 Wend. (N. Y.) 393.
[1] Cox v. Stern, 170 Ill. 442, 48 N. E. 906, 62 Am. St. Rep. 385.
[2] American Freehold, etc., Co. v. Thornton, 108 Ala. 258, 19 So. 302, 54 Am. St. Rep. 148, and note page 150.

to be without jurisdiction and so open to impeachment on contention that the party never appeared before the notary,[3] or that the notarial certificate was made before the signature of the party,[4] or that the party was insane at the time.[5] Where an affidavit is required to be on oath and the officer fails to sign the jurat, the paper may be admitted if it is proved that the affidavit was actually made but in the absence of such proof the paper itself although in the form of an affidavit will be considered as no affidavit at all.[6] A notarial copy of a lost note was permitted to go to the jury as a presumption, in connection with the testimony of a witness, that the paper shown to the notary was the same which had been in the witness's possession and acknowledged by one of the defendants.[7] A copy of the manifest of the cargo taken in at Havana, and certified without a seal by a notary, with a certificate, signed by three notaries, that full faith and credit ought to be given to the acts of their associate, was not permitted to be read in evidence, because it did not appear that the notary had charge of these papers, and authority to authenticate them. A notarial seal, applied as required by the law of the place where it is affixed, proves itself, and is sufficient evidence of the official character of the notary using it.[9] In a chancery attachment against a British bankrupt, a notarial copy of the commissioner's proceedings is evidence.[10] The characters "N. P." following the name of a person signing the certificate of an oath, clearly indicate the office of notary public.[11] In Indiana, the certificate of a notary, authorized by the laws of his own State to administer oaths, is by statute made presumptive evidence.[12] In Kentucky, a notarial certificate of a man being a citizen of the United States, such as is usually

[3] But if it is shown that the grantor did actually appear before an officer for the purpose of acknowledging a conveyance and he has made some kind of an acknowledgment the certificate of the officer in relation to the manner and terms and as to the fact of the acknowledgment would be conclusive in favor of the purchaser in good faith who has relied upon the truth of the certificate. Le Mesnager v. Hamilton, 101 Cal. 532, 35 P. 1054, 40 Am. St. Rep. 81; Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699.

[4] Cheney v. Nathan, 110 Ala. 254, 20 So. 99, 55 Am. St. Rep. 26.

[5] Thompson v. New England Mortgage Security Co., 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29.

[6] Tacoma Grocery Co. v. Draham, 8 Wash. 263, 36 P. 31, 40 Am. St. Rep. 907.

[7] Peabody v. Denton, 2 Gall. (U. S.) 351.

[8] Talcott v. Delaware Ins. Co., 2 Wash. 449.

[9] Orr v. Lacy, 4 McLean, 243.

[10] Wilson v. Stewart, 1 Cranch (U. S. C. C.), 128.

[11] Rowley v. Berrian, 12 Ill. 198.

[12] Andrews v. Ohio, &c., R. R. Co., 14 Ind. 169.

obtained by persons going abroad, is not evidence of his having made preparations to leave the country.[13] And in an action to recover the consideration paid for a United States treasury note which has been refused payment, the notarial protest is not evidence of the reasons for such refusal by the treasurer;[14] and generally, notarial certificates of facts happening in the State, have not been admitted as evidence, unless they relate to bills of exchange or protests in relation to ships and vessels; and in the latter case they are never considered as evidence, except in contradiction to evidence given in regular form by the party making the protest.[15] The record of a deceased notary is admissible for the consideration of the jury, in order to prove a notice, although the entry is doubtful as to the meaning. But a clerk of the notary cannot be allowed to explain what the notary meant by the entry.[16] Thus, the notarial certificate of a deceased notary, purporting on its face to be made out and signed several months after the protest of the note, is admissible in evidence, even though it be proved that such notarial certificate was the only record ever kept by the notary of his acts in the premises.[17] Where a notary public protested a note for non-payment, having at the time interest therein, and he afterward became the holder of the note, it was held, in an action on the note after his decease, by his executor, against an indorser, that the certificate of the notary was competent evidence for the plaintiff.[18]

Sec. 206. Marine Protests and Surveys.

The protest of one of the sailors of a captured vessel, made after his return to the United States at the first port, and left with the brokers of the insurers to fix the period from which the loss was to be paid, may be given in evidence for that purpose, but it is not evidence of any fact contained in it.[1] So the protest of some of the crew, taken abroad, may be read to invalidate their evidence under a commission.[2] But the protest of the master of a vessel is a mere narration of the bad weather he has met with, and cannot

[13] Foster v. Davis, 1 Litt. (Ky.) 71.
[14] Moore v. Worthington, 2 Duv. (Ky.) 307.
[15] Welsh v. Barrett, 15 Mass. 380.
[16] Duncan v. Watson, 10 Miss. 121.
[17] Booth v. Watson, 13 Miss. 295.
[18] McKnight v. Lewis, 5 Barb. (N. Y.) 681.
[1] Ruan v. Gardner, 1 Wash. (U. S.) 145.
[2] Winthrop v. Union Ins. Co., 2 Wash. 7.

be received as evidence for himself or his owners.[3] But the captain's certificate, that wages were due, though the vessel was in port, not earning freight, is sufficient evidence thereof, though the articles were not produced.[4] The protest of a master of a vessel is not evidence, *per se;* it can only be used in a court governed by the rules of the common law, to impeach the testimony of the master himself, or as incidentally corroborative of the log-book.[5] An alleged copy of a survey not made by order of a court of admiralty, there being no evidence that the surveyors acted under the sanction of an oath, is not admissible in evidence, although stamped by the American consul of the port of survey.[6] But the certificate of a marine surveyor and inspector, made in the course of his business, is competent evidence of the seaworthiness of a vessel at that time, if supported by his oath that he examined the vessel, and that he has no doubt that the facts stated in it are true, although he has no independent recollection of those facts.[7] A surveyor's report, however, upon a damaged vessel, stating his opinion concerning the repairs necessary to be made, and an estimate of their cost, is not admissible in evidence in an action against the insurers, where the only evidence to corroborate such report is the testimony of the surveyor himself that the condition of the ship appeared fully in the report.[8] A protest is not evidence to show that a captain is not chargeable with the loss of cargo.[9]

Sec. 207. Consular Certificates.

The certificate of the American consul at a foregn port, under his seal of office, that the ship's papers were lodged with him, agreeably to the requisitions of the embargo law, is good evidence of that fact, but not of other facts stated in it.[1] Indeed, the rule may be said to be invariable, that the certificate of any officer, is only good as evidence, as to such matters and facts as he is by law

[3] The May Queen, 1 Newb. Adm. 464.

[4] Minors v. The Mary, Bee, 119.

[5] Straffin v. Newell, T. P. Charlt. (Ga.) 172; Lamalere v. Caze, 1 Wash. (U. S.) 413; Hempstead v. Bird, 1 Day (Conn.), 89.

[6] Stephenson v. Piscataqua Fire, &c., Ins. Co., 54 Me. 55.

[7] Perkins v. Augusta Ins., &c., Co., 10 Gray (Mass.), 312.

[8] Howard v. Orient, &c., Ins. Co., 2 Robt. (N. Y.) 539.

[9] Cunningham v. Butler, 2 Hayw. (N. C.) 392.

[1] United States v. Mitchell, 2 Wash. (U. S.) 478.

required to keep a record or give a certificate of. His certificate is not evidence of acts which are not official nor within his personal knowledge, but such a certificate is competent to remit a penalty due the United States.[6] An American consul at a foreign port is without authority to make an authenticated copy of a draft drawn here, by the owner of a ship, upon the consignees of such ship at such foreign port,[7] and his certificate of the death of an individual abroad is not sufficient proof of that fact.[8]

Sec. 208. Certificates by Appraisers, Inspectors, Etc.

Where personal property was leased to the defendant, a written appraisal of the whole of it by persons appointed to appraise a portion of it, is not admissible evidence in an action against him, though it was agreed between the parties that the whole should be appraised;[9] but when such a certificate is admissible as evidence of a fact stated in it, the person making it cannot contradict it. Thus, it has been held not competent for a surveyor of lumber, whose survey has been returned and recorded as provided in the statute regulating the survey of lumber, to show, by his testimony, that the lumber surveyed by him was of a different quality from that stated in his survey.[10]

Inventories of the estates of persons deceased are admissible as *prima facie* evidence, for or against strangers, for many purposes; being made by persons appointed under authority of law, to investigate a matter of fact of general interest, under oath, and to make a return or report upon the subject, to be preserved of record.[11]

The official certificate or stamp of a government inspector is not conclusive evidence that the article stamped is of the quality denoted by the stamp; it may be shown to be of a different quality.[12] But when the statute declares that the certificate of a certain officer shall be evidence of certain facts, parol evidence is inadmissible, both under the statute and on general principles.[13]

[6] Brown v. The Independence, Crabbe (U. S.), 54.

[7] Williams v. Seescent, &c., Ins. Co., 15 La. Ann. 651.

[8] Morton v. Barrett, 19 Me. 109.

[9] Great Pond Co. v. Buzzell, 39 Me. 173.

[10] Whitman v. Freese, 23 Me. 212.

[11] Seavey v. Seavey, 37 N. H. 125.

[12] Clintsman v. Northrop, 8 Cow. (N. Y.) 45.

[13] Hammondsport & Bath Plank Road Co. v. Brundage, 13 How. Pr. (N. Y.) 448.

When, from the omission of the signature or any other cause, the authenticity of an alleged certificate of a certain officer is not manifest and clear, it becomes a question of fact to be found like any other.[14]

Sec. 209. Certificates by Land Officers.

A certificate from the land office of the United States is to be taken as genuine, and what it purports to be, until the contrary appears.[1] But the certificate of a land officer cannot be evidence of any fact unless expressly made so by statute of the State or of congress.[2] The certificate of the register of the United States land office is competent evidence to show title in land, and needs no authentication.[3] And the same is true as to a certificate of the surveyor-general going to show that a wrong name was inserted in a State grant.[4] Indeed the official certificate of the register of a land office to any act on record in his office is competent evidence of that fact.[5] And the certificate of a register and receiver of any land office in the Unted States to any fact or matter of record in his office, is competent evidence to prove such fact.[6] The recorder's certificate is competent evidence to show who entered land in dispute.[7] A certificate of a register of deeds that he had examined the records of his office and found on record a plat of a part of a certain city, and that there was no other plat on file or of record relating to said city that he could find, is inadmissible. In general, a certificate of mere matter of fact not coupled with any matter of law is not receivable in evidence.[8] If, however, lands are stricken off to the commonwealth for non-payment of taxes, and redeemed by their payment within the time limited by law, the register's receipt is competent to prove the redemption.[9] In an action to enforce a judicial mortgage, the certificate of the recorder that the judgment has been recorded in his office, has the same effect as evidence when drawn upon a duly certified copy of the judgment as it would have on a separate and distinct paper; but the recorder's certificate is only *prima facie* evidence of the

[14] Brink v. Spauling, 41 Vt. 96.
[1] Cox v. Jones, 1 Stew. (Ala.) 379.
[2] Mayo v. Johnson, 4 Ark. 613.
[3] Floyd v. Ricks, 14 Ark. 286.
[4] Brooking v. Dearmond, 27 Ga. 58.
[5] Ross v. Reddick, 2 Ill. 73.
[6] Delanney v. Burnett, 9 Ill. 454.
[7] York v. Sheldon, 18 Iowa, 569.
[8] Bemis v. Becker, 1 Kan. 226.
[9] Taylor v. Steele, 1 A. K. Marsh. (Ky.) 315.

facts stated in it, and if untrue may be contradicted by proof.[10] In an action for damages occasioned by a mill-dam, to land held under the pre-emption law, the certificate of the register of the land office in which the land lies is admissible to prove the filing of the declaratory statement upon the land in question;[11] but the certificate of the register of the land office that a map is a correct representation of a part of a township, is not sufficient to make it evidence under a statute making copies of records evidence; it should certify that it is a true copy of the original, and that the original is of record in the office.[12] A certificate of the right of pre-emption is *prima facie* evidence of the title against a New Madrid certificate and survey,[13] and a certificate of the secretary of the land office, authenticating an entry which he is not authorized by statute to authenticate, is not admissible in evidence.[14] So a certificate of the secretary of the land office that he had searched for a certain warrant and could not find it, is admissible in evidence.[15] That there has been a conveyance between two parties or that a deed purporting to convey has been filed at his office, cannot be proved by the certificate of the commissioner of the general land office.[16]

Sec. 210. Surveys of Land.

A copy of a warrant of survey, under the surveyor-general's hand, and containing his directions to the deputy sheriff to make the survey, is admissible in evidence,[1] and the official certificate of survey, returned by a legal sworn surveyor, in Virginia, cannot be invalidated by a particular fact, tending to show an impossibility that the survey could have been made in the time intervening between the date of the entry and the date of the certificate of survey.[2] But the fact that a copy of a certificate of survey was delivered by the Spanish authorities of New Orleans, in 1803, to a person applying for documentary proofs of title to the land, does not

[10] Taylor v. Pearce, 15 La. Ann. 564.

[11] Dorman v. Ames, 12 Minn. 451.

[12] Doe v. King, 4 Miss. (3 How.) 125.

[13] Rector v. Welch, 1 Mo. 334.

[14] Garwood v. Dennis, 4 Binn. (Penn.) 314.

[15] Weidman v. Kohr, 4 S. & R. (Penn.) 174.

[16] Smithwick v. Andrews, 24 Tex. 488.

[1] Hewes v. M'Dowell, 1 Dall. (U. S.) 5.

[2] Pollard v. Dwight, 4 Cranch (U. S.), 421.

prevent the authenticity of the certificate from being impeached.[3] The certificate of a county surveyor is no evidence of possession, except where the route of a watercourse making the boundary of a tract of land is so changed as to leave the tract or part of it on the opposite side from that on which it was at the time of the survey, and the surveyor is called on to make an accurate survey of the part of the tract cut off.[4] A coast survey chart is admissible as an official record to prove the existence of a private way.[5] The certificate of the deputy surveyor of the county where land lies, is *prima facie* evidence that a survey was made at the time it purports to have been made.[6] A surveyor's report is evidence of the present existence of objects found upon the land; but it may be impeached or falsified by other evidence. A coincidence between the objects mentioned in a grant or deed, and those reported by the surveyor, may be satisfactory evidence of the boundary of the land in dispute.[7] Where a surveyor's report is to be substantive evidence, in a suit in ejectment, all the defendants who are of full age ought to have notice of the time of making it; and a temporary absence of one defendant will not excuse the want of notice.[8] A surveyor's certificate, on the recital of its contents in a patent, cannot be contradicted by parol evidence; evidence, even by the surveyor himself, to show that the survey was never made, or was made at a different time, is inadmissible.[9] Notes or memoranda of a surveyor who is dead, indorsed on his certificate of survey, are, on proof of his handwriting, competent evidence to show the original running of the land to which they relate, but not to elongate, or shorten, or in any manner to affect the position of the land as described in the grant.[10] Where, in a suit for the recovery of lands, a survey of the premises was ordered, and the surveyor's certificate was objected to as not identifying the lands surveyed with those sued for, it was held that a general description in the certificate of the bounds of the whole, which was specific enough to enable witnesses to identify the land, was sufficient to make the cer-

[3] United States v. King, 3 How. (U. S.) 773.
[4] Dillon v. Mattox, 21 Ga. 113.
[5] Clark v. Hull, 184 Mass. 164, 68 N. E. R. 60.
[6] Hoy v. M'Murry, 1 Litt. (Ky.) 364.
[7] Heffington v. White, 1 Bibb (Ky.), 115.
[8] Ewing v. Savary, 3 Bibb (Ky.), 235.
[9] Cain v. Flynn, 4 Dana (Ky.), 499.
[10] Snavely v. M'Pherson, 5 H. & J. (Md.) 150.

tificate admissible in evidence.[11] A survey in which there is a clerical error is good evidence. So, also, is a deed, signed by a part of the grantors, and not recorded;[12] but a copy of a survey, not returned nor verified by the surveyor, cannot be read in evidence;[13] nor is a plat of a survey, found among the papers of an assistant, not signed nor returned by the deputy surveyor.[14] A survey is admissible though it does not recite the authority by which it is made;[15] and the field-notes of a deputy surveyor, showing a survey for A. at a particular time; a warrant in B.'s name calling for A., as adjoining; and an old draft of a survey, found in the surveyor's office, indorsed in his handwriting, were admitted in evidence to support a title.[16] A return of survey into the surveyor-general's office, and a lapse of twenty years afterward without any attempt made during that time to take exception or objection to it, is conclusive evidence that it was regularly made.[17]

Sec. 211. United States Departmental Records.

The acts of congress, making transcripts from the departments at Washington evidence against public debtors, though in derogation of the common law, are valid, and the transcripts *prima facie* proof; but the mode prescribed by law for authenticating them must be strictly pursued.[1] Certified transcripts of the accounts kept at the treasury department are made evidence of the facts entered and the balance due, in actions between the government and its officer and their sureties.[2] The provision of an act of congress, declaring that all copies of bonds, contracts or other papers, relating to or connected with the settlement of any account between the United States and an individual, when certified by the register to be true copies of the originals on file, and authenticated under the seal of the treasury department, shall have equal validity and

[11] Spears v. Burton, 31 Miss. 547.
[12] Brown v. Long, 1 Yeates (Penn.), 162.
[13] Davis v. White, 3 Yeates (Penn.), 587.
[14] M'Kenzie v. Crow, 4 Yeates (Penn.), 428.
[15] Sproul v. Plumstead, 4 Binn. (Penn.) 189.
[16] Boyle v. Johnston, 6 Binn. (Penn.) 125.
[17] Nieman v. Ward, 1 Watts & S. (Penn.) 68.
[1] United States v. Harrill, 1 McAll. (U. S. C. C.) 243; Gilman v. Riopelle, 18 Mich. 145; Crowell v. Hopkinton, 45 N. H. 9.
[2] Walton v. United States, 9 Wheat. (U. S.) 651; Bruce v. United States, 17 How. (U. S.) 437; United States v. Patterson, Gilp. (U. S. C. C.) 44; Postmaster-Gen. v. Rice, id. 554.

be entitled to equal credit with the originals, is not restricted to cases where suits are commenced under the authority given by section 1 of the act, but applies to all cases where the evidence is required.[5] The third auditor is not authorized to authenticate copies of bonds and other papers. His power, under the statute, extends only to "transcripts from the books and proceedings of the treasury in regard to the accounts of the war department." Copies of bonds must still be certified by the register, and authenticated under the seal of the department.[6]

Sec. 212. Weather Reports.

On the issue of the condition of the weather during a certain period one who was in charge of the United States weather bureau may read in evidence the records of his office as to the weather during the period involved,[1] even when made by the predecessor of the witness, as they are presumed to be correct.[2] So official reports are admissible as to the weather ten miles away from the point of observation, together with evidence that weather reports would, as a rule, be correct for the surrounding country.[3] Weather reports kept by railroad agents at a voluntary observation station of the department of agriculture are not admissible in the absence of the clerk who made them. Their preservation was not exacted in the performance of any duty owing to the railroad company or to the government.[4]

Sec. 213. Land Office Papers and Records.

A transcript from the books or papers on file in the general land office, or to the Indian bureau of the department of the interior,

[5] United States v. Lent, 1 Paine (U. S. C. C.), 417.

[6] United States v. Griffith, 2 Cranch (U. S. C. C.), 366; Wickliff v. Hill, 3 Litt. (Ky.) 330.

[1] Anderson v. Hilker (Wash., 1905), 80 Pac. 848. Weather records kept in State insane asylum held admissible, see Armond v. Neasmith, 32 Mich. 231.

[2] An employee of the weather bureau may testify as to the result of his examination of the government reports of the rainfall for the past eighteen years, which records were kept partly by himself and in part by his predecessor. He was permitted to state the average rainfall for the past eighteen years and also the rainfall on a certain day, on the theory that government records are presumed to be correct. Scott v. Astoria R. Co., 43 Oregon, 26, 72 Pac. 594.

[3] Mears v. New York, etc., R. Co., 75 Conn. 171, 52 A. 610.

[4] Monarch Mfg. Co. v. Omaha, O. B. & S. Ry. Co. (Iowa, 1905), 103 N. W. 493.

if properly certified, under the seal of the department, by the "acting commissioner," is admissible in evidence.[1] So the surveyor-general's certificate that a copy of a decree of confirmation, by the United States board of land commissioners, is a correct copy thereof, "as the same is on file," etc., is sufficient to admit the copy in evidence in a suit in ejectment.[2] A certified copy of a patent for lands issued by the United States is admissible in evidence on common-law principles. Acts of public officers in the execution of the laws, who are required to make and keep public records of their surveys, sales and conveyances, may be shown by the public records kept and made according to law, or by copies thereof, duly certified by the proper officer under the seal of his office.[3]

So sworn copies of affidavits on file in the office of the register of a land office, respecting a pre-exemption right, are admissible as evidence in cases in which the originals, could they be procured, would be evidence.[4] A letter of the commissioner of the land office, affecting the title to lands entered from the United States government, may be proved by an authenticated copy.[5] The exemplification of a patent certified by the commissioner of the general land office, is admissible in evidence without proof of the loss of the original.[6]

Written statements of a register of the United States land office and the State land commissioner as to what the records in their offices show, are not admissible for any purpose. The proper evidence of these facts in the absence of the original, is a copy of the record duly authenticated.[7] The report of the surveyor-general to the commissioner of the general land office, detailing the history of his operations in making a survey, is inadmissible in evidence to prove the location of the land surveyed.[8] So an exemplification of any record or paper required by law to be filed in the land office, is, as evidence, of equal authority with the original.[9]

[1] Stephens v. Westwood, 25 Ala. 716.
[2] Young v. Emerson, 18 Cal. 416; Clark v. Hammerle, 36 Mo. 620.
[3] Lane v. Bommelmann, 17 Ill. 95.
[4] Smith v. Mosier, 5 Blackf. (Ind.) 51.
[5] Davis v. Freeland, 32 Miss. 645.
[6] Barton v. Murrain, 27 Mo. 235.
[7] Kelley v. Laconia Levee District (Ark., 1905), 85 S. W. 249.
[8] Clark v. Hammerle, 36 Mo. 620.
[9] Lee v. Getty, 26 Ill. 76; Harris v. Dove, 4 Blackf. (Ind.) 369; Smith v. Mosier, 5 id. 51; Stephenson v. Doe, 3 id. 508; Harden v. Ho-yo-po-nubby, 27 Miss. 567.

Sec. 214. Custom-house Records.

A copy of a manifest, recorded at a custom-house, and examined, is good evidence.[1] So a copy of a clearance at another port in the United States, properly certified by the deputy collector under seal as a true copy of the original, is competent evidence to establish the date of the clearance, when accompanied by testimony that the person certifying was at the time acting deputy collector, that his signature was genuine, that the seal was the custom-house seal, and that the original had been on file in the custom-house of the port for which the vessel cleared, but could not be found after due search.[2]

The enrollment of a steamboat is a record, of which the collector of customs is the custodian, under the acts of congress, and a copy thereof, duly certified by the collector, is competent evidence; as is also such a copy of the act of sale recorded under the act of congress of 1850.[3] A copy of any enrollment, certified to be such by the collector, is not admissible evidence, he not being authorized to grant copies generally.[4]

Sec. 215. State Land Office Papers.

On the question between the State and adverse claimants whether certain lands are canal lands, the findings, maps, plans and surveys made by the canal commissioners are not admissible in behalf of the State as made *ex parte* with no opportunity to the landowner for a hearing.[5] A paper, purporting to be "a certified extract from the general draft of certain districts, as framed and approved by the surveyor-general, remaining in his office," under the seal of the office, is not evidence; it being only an extract, and not being a copy of an office paper;[6] nor can an affidavit made in connection with a warrant of survey, and certified as an office paper in the land office, be given in evidence;[7] nor is the certificate of the register of the land office, appended to a transcript from the books of his office, that the same is a true copy, of itself testimony before the jury; the scope of the certificate being merely to make the copies

[1] United States v. Johns. 4 Dall. (U. S.) 412.
[2] White v. Kearney, 2 La. Ann. 639.
[3] Sampson v. Noble, 14 La. Ann. 347.
[4] Dyer v. Snow, 47 Me. 254.
[5] State v. Cincinnati Tin & Japan Co., 66 Ohio, 182, 64 N. E. R. 68.
[6] Griffith v. Tunckhouser, Pet. (U. S. C. C.) 418.
[7] Lanning v. Dolph, 4 Wash. 624.

of the entries evidence.[4] But generally, duly authenticated copies from the State land office are admissible.[5] A deed of a grantee of the State cannot be considered as belonging to the archives of the State, so as to be proved by a copy made by the land agent.[6] A copy of a certificate of entry by a register will not be received in evidence where it appears that the original is on the files in the general land office;[7] and where a certified copy of the original certificate and survey from the land office were offered in evidence to give color to title, the copy was rejected because the certificate was not accompanied by evidence of its having been recommended as genuine.[8] A *hipotica especial* (a security in the nature of a mortgage) and its transfer, are not papers pertaining to the records of the general land office, nor archives of the office, and therefore copies of them certified by the commissioner of the land office are inadmissible in evidence.[9] Tax lists are inadmissible to prove the value of real estate as they are "*res inter alios acta.*"[10]

Sec. 216. State Grants.

Certified copies of the surveyor-general's grants are inadmissible, unless a sufficient basis be laid for their introduction.[11] In North Carolina, patents or grants from the State, being recorded in the office of the secretary of State, copies of them, obtained from that office, may be given in evidence without accounting for the originals, by all persons except the patentees or grantees themselves, or those claiming under them, who would be entitled to the possession of the originals.[12] A copy of a grant from the register's office, and one from the office of the secretary of State, are both secondary evidence; and where secondary evidence is admissible, it is no objection to the copy from the register's office that one

[4] Johnson v. Mays, 8 Ark. 386.

[5] Franklin v. Woodland, 14 La. Ann. 188; Finley v. Woodruff, 8 Ark. 328; Sessions v. Reynolds, 15 Miss. 130; Wray v. Ho-ya-pa-nubby, 18 Miss. 452; Harper v. Farmers, &c., Bank, 7 W. & S. (Penn.) 204; Oliphant v. Ferren, 1 Watts (Penn.). 57; Grant v. Levan, 4 Penn. St. 393; Houston v. Perry, 3 Tex. 390; Mason v. McLaughlin, 16 Tex. 24; Dikes v. Miller, 25 Tex. Supp. 281; Pollard v. Lively, 4 Gratt. (Va.) 73; Ward v. Moorey, 1 Wash. T. 122.

[6] Hammatt v. Emerson, 27 Me. 308.

[7] Doe v. M'Caleb, 3 Miss. 756.

[8] Ryan v. Jackson, 11 Tex. 391.

[9] Mapes v. Leal, 27 Tex. 345.

[10] Suffolk & C. Ry. Co. v. West End Land & Improvement Co. (N. C., 1904), 49 S. E. 350.

[11] Hensley v. Tarpey, 7 Cal. 288.

[12] Candler v. Lundsford, 4 D. & D. L. (N. C.) 407.

from the office of the secretary would be better evidence.[13] Generally, it may be said that a copy of a grant is not admissible in evidence, without first accounting for the non-production of the original.[14] Office copies of grants, certified by the secretary of State and surveyor-general or other deputies, are made admissible in evidence, in South Caroline, by statute.[15] Where the commissioner of the general land office gave a certified copy of a grant, under which the plaintiff claimed, and annexed to it what purported to be a release by the original grantee to the government, of the genuineness of which release there was no proof, it was held that the plaintiff was not bound to read such release with the rest of the document.[16]

Sec. 217. State Records.

A certificate from the executive department is admissible in evidence if it gives substantially the contents, or a part of the contents, of the thing to which it relates. It is not necessary that it should give a copy of the thing to which it relates.[17] A transcript from the books of the treasurer of the State is competent evidence to show that a State tax has been paid.[18] In Ohio, by statute, certified copies of the files of the auditor of State are made evidence, but it is held that this authorizes their admission only when the originals would be evidence.[19]

In an action by a sub-contractor against a contractor, to recover for work done on the public works, sworn copies of estimates from the office of the resident engineer are competent evidence.[20] So a certified copy of a contract for constructing a section of the Pennsylvania canal, from the auditor's office, is admissible without the subscribing witnesses.[21] A certified copy of the executive minutes, is not evidence of a witness's pardon. The pardon or a certified copy is necessary.[22] An undated, unsigned memorandum on the back of an envelope from the fire marshal's office may be identi-

[13] Osborne v. Ballew, 7 Ired. L. (N. C.) 415.
[14] Malcolmson v. M'Kee, 1 Brev. (S. C.) 168.
[15] Maxwell v. Carlile, 1 McCord (S. C.), 534; Rochell v. Holmes, 2 Bay (S. C.), 487; Gourdine v. Barino, Harp. (S. C.) 221; S. P. Linning v. Crawford, 2 Bailey (S. C.), 296.
[16] Dikes v. Miller, 11 Tex. 98.
[17] Henderson v. Hackney, 16 Ga. 521.
[18] Hodgdon v. Wight, 36 Me. 326.
[19] State v. Wells, 11 Ohio, 261.
[20] Lyon v. McCadden, 15 Ohio, 551.
[21] Connor v. Standard Pub. Co., 183 (Penn.), 347.
[22] Cox v. Cox, 26 Penn. St. 375.

fied as his official record by the stenographer's testimony to that effect, although it did not appear in whose handwriting it was.[23]

Sec. 218. Verdicts and Interlocutory Matters.

A verdict upon which no judgment has been rendered is not admissible in evidence,[1] nor is one which has been set aside for any cause.[2] Of course verdicts are only binding upon parties and their privies,[3] but as between them, after judgment thereon, they are conclusive in any subsequent suit involving the same subject-matter.[4] Where fraud is charged in an action for money had and received evidence of the acquittal of the defendant in a criminal prosecution based upon the same fraud is incompetent.[5]

By special agreement between the parties to several suits involving the same questions, a verdict in one action may conclude all, as when several underwriters against whom separate actions were brought for the same loss agreed to abide by the verdict in one, it was held that the verdict in that action was admissible as evidence in the others.[6]

Formerly in England the office of coroner was a judicial office of great dignity and his court is in England still a court of record. But in this country a coroner's court is not ordinarily a court of record and the coroner's verdict is not admissible in evidence even though the statutes provide that it be filed in court,[7] although the coroner's record may be used to prove admissions of parties.[8]

[23] Connor v. Standard Pub. Co., 183 Mass. 474, 67 N. E. R. 596.

[1] Dougherty v. Lehigh Coal, etc., Co., 202 Pa. State, 635, 52 A. 18, 90 Am. St. Rep. 660; McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333; Donaldson v. Jude, 2 Bibb. (Ky.) 57; Hinckle v. Carruth, Tread. (S. C.) 471; United States v. Addison, 6 Wall. (U. S.) 291.

[2] Mahoney v. Ashton 4 H. & M. (Md.) 295.

[3] Davis v. Wood, 1 Wheat. (U. S.) 6.

[4] Preston v. Hanney, 2 H. & M. (Va.) 55.

[5] Fowle v. Child, 164 Mass. 210, 41 N. E. 291, 49 Am. State Rep. 451.

[6] Patton v. Caldwell, 1 Dall. (U. S.) 419.

[7] Cox v. Royal Tribe, 42 Ore. 365, 71 Pac. 73, 95 Am. St. Rep. 752, and note 763. (As to testimony before coroner see Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. R. 1066; Edwards v. Grimbel, 202 Penn. 30, 51 A. 357); Chambers v. Modern Woodmen of America, (S. D., 1904), 99 N. W. 1107; Boehme v. Southern Camp, etc., (Tex. Civ. App., 1904), 85 S. W. 444. *Contra* Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. R. 1066.

[8] The record of a coroner's inquest attached to proofs of death made by the beneficiary or his agent under an insurance policy is admissible in evidence upon the ground that it con-

The question when a decision of a court on a motion becomes a final adjudication between the parties of the matters necessarily involved in the consideration of the motion is often one of much difficulty. It has been held in Kansas that orders confirming or setting aside judicial sales are conclusive on all matters involved in the proceedings of the officer executing the writ, probably because the determination of such motion becomes a final order after judgment, but a motion to discharge an attachment lacks the elements of a formal adjudication of title to the attached property.[9] An order made on a summary hearing in the course of a proceeding may be conclusive as a bar to a new action. So the decision of a petition by an insolvent in the insolvency court for an order that the assignee pay over to him certain funds is conclusive of a new action by him on the same cause.[10] Probate courts are everywhere courts of general and exclusive jurisdiction over the estates of deceased persons and their adjudications cannot be collaterally attacked. So a sale made under an order of the probate court cannot be impeached collaterally by showing that the debts under which the sale was made were contracted prior to the issue of the United States patent to the land sold and consequently that the sale was void under the United States Homestead Laws where the probate record does not show when the debts were contracted.[11] The appointment by the probate court of a guardian for an infant cannot be attacked collaterally by showing that the court had no jurisdiction as the infant was not a resident of the county unless that fact appears from the record, neither can the appointment be attacked collaterally by showing that another guardian had previously been appointed for the child by a court for another county.[12] It is competent to show that one of the parties has pleaded the statute of frauds in another action involving the same transaction by introducing the pleadings in that action although it may be still pending.[13]

tains admissions of the beneficiary against his interests as to the cause of death, bbut the coroner's inquest is not admissible when attached to proofs furnished by the company's agent. Cox. v. Royal Tribe of Joseph, 42 Ore. 365, 71 Pac. 73.

[9] Blair v. Anderson, 58 Kan. 97, 48 P. 562, 62 Am. St. Rep. 606.

[10] Sunkler v. McKenzie, 127 Cal. 554, 59 P. 982, 78 Am. St. Rep. 86.

[11] J. B. Watkins Land, etc., Co. v. Mullen, 62 Kan. 1, 61 P. 385, 84 Am. St. Rep. 372.

[12] Cox v. Boyce, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483.

[13] De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938.

Sec. 219. Judgments, Proof of.

The proceedings of a court of record can only be proved by the record itself, certified by the clerk under the seal of the court.[1] The original files in the case accompanied by the testimony of the clerk and the execution are insufficient.[2] But when there is not a plea of *nul tiel record,* but the record becomes material to prove some allegation in the pleadings, or upon some collateral issue, it may be proved either by the production of the record when complete, by an exemplification or by an examined or other authenticated copy. In England, formerly, records of judgments of the superior courts at Westminster, etc., were not complete until entered on parchment and enrolled;[3] and a copy of a judgment, in paper, signed by the master, was not evidence of the judgment, for it had not yet become permanent;[4] though such entry was sufficient to warrant execution. In one case,[5] the issue roll, not under the seal of the court, with a *nolle pros.* entered thereon against a co-defendant, was held insufficient proof of the *nolle pros.* It would seem that a regular entry on record was necessary. *But where the pleadings did not allege any matter of record,* but only averred the pendency of a judicial proceeding before the record is made up—as that a trial was had—the fact might be proved by the production of the *nisi prius record,* or indictment, which are the official minutes; and, in some cases, perhaps, by mere oral evidence.[6]

An execution offered in evidence must conform to the judgment, on which it is claimed to be founded,[7] although where an execution contained a clerical error as to the date of the judgment it was held that the judgment plaintiff might testify, to connect the execution with the judgment, that he had never recovered or had any other judgment against the defendant than the one admitted in evidence and an execution docket is admissible to identify the

[1] Northrop v. Chase, 76 Conn. 146, 56 A. 518. To show the facts concluded by a judgment the record must be produced. Gambrill v. Schooley, 93 Md. 48, 52 A. 500. 505; Kelly v. Morray, L. R., 1 C. P. 158; Comyns' Dig., Record (A) (B); Kemp v. Neville, 10 C. B. N. S. 523.

[2] Waterbury Lumber & Coal Co. v. Hinckley, 75 Conn. 187, 52 A. 739.

[3] B. N. P. 228; Glynn v. Thorpe, 1 B. & A. 153.

[4] B. N. P. 228.

[5] Fagan v. Dawson, 4 M. & G. 711.

[6] Pitton v. Walter, 1 Stra. 162; R. v. Browne, M. & M. 315; R. v. Newman, 2 Den. C. C. 390.

[7] Kinkade v. Gibson, 209 Ill. 246, 70 N. E. R. 683.

execution.[8] When the record does not settle the question, evidence is admissible to show what was in fact decided by a judgment.[9]

To prove a fact connected with proceedings in another court, a transcript of the whole record is the best evidence, and a portion of the record, as the judgment, is incompetent as it may be misleading[10] in cases where a party intends to avail himself of the judgment or decree as an adjudication upon the subject matter and where it is material for the record to show the jurisdiction of the court rendering the decree. But a part of the record may be introduced to prove some collateral fact in issue. So where it was material to show that a party had a certain sum of money at a certain date the record of a decree for distribution in probate granting him that sum is admissible although the whole record is not transcribed.[12] Testimony of a witness who has examined the record in a case is inadmissible to prove the record, but a certified copy of it under the hand and seal of the clerk should have been produced, as it is the best evidence.[13] It has been held that the minute-book of the clerk of the peace is not enough to prove that an indictment was preferred; nor is the original indictment itself, though indorsed as a true bill;[14] yet in both these cases, the allegation of the indictment was only introductory to the gist of the proceeding, which was a conspiracy to keep back a witness in one case, and an action on an agreement, after indictment found, in the other. Nor is the minute-book in which the proceedings at sessions are entered, and from which the record is made up, evidence of the names of the justices in attendance at the trial of it.[15] Where the record alleges an adjournment by A. and others, parol evidence may be given as to the justices actually present. The minutes of proceedings are evidence of them on a trial before the same court sitting under the same commission.[16] An allegation

[8] De Loach v. Robbins, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46.

[9] Fahey v. Esterly Machine Co., 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554.

[10] Southern Ry. Co. v. Seymour, (Tenn.) 83 S. W. 674. A certificate by a clerk of court under the caption of a case "judgment in favor of the plaintiff against the defendant for $250 and $67.10 costs," is a mere abstract, is only the construction of the clerk's entry in the record and does not prove the judgment. Thompson & Lively v. Mann, 53 W. Va. 432, 44 S. E. 246.

[12] Mayer v. Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196.

[13] Stewart v. State, 35 Tex. Crim. Rep. 174, 32 S. W. 766, 60 Am. St. Rep. 35.

[14] R. v. Smith, 8 B. & C. 341; Porter v. Cooper, 1 C. M. & R. 388.

[15] R. v. Bellamy, Ry. & M. 171.

[16] R. v. Tooke, cited 8 B. & C. 343; R. v. Newman, *supra*.

that an appeal came on to be heard at the sessions must be proved by the production of the record regularly made up in parchment;[17] but where (as is usually the case) no record but the minute-book is kept by the sessions, such book was admitted in evidence.[18]

In an action upon a judgment, any variance between the judgment described in the declaration from that of the record will exclude the record from being received as evidence.[19]

Where the plaintiff was enjoined from collecting the amount of a judgment recovered by him, and execution was afterward issued thereon, under which land of the defendant was sold in an action by the purchaser to recover possession, the record of the judgment is admissible in evidence without first producing the sheriff's deed, the decree dissolving the injunction and the injunction bond.[20] If an entry record does not show when it was made, a judgment *nunc pro tunc,* ascertaining the date, cannot be contradicted by showing the dates of preceding and succeeding entries.[21] Judgments and the proceedings in the causes in which they were rendered can only be proved by the production of the record itself, or by a certified or examined copy, by the clerk of the court. They are not sufficiently verified by the oath of a witness that he was at one time clerk of the court, and that certain papers exhibited to him as records of the court, were issued and filed by him when he was clerk of the court, and are in his handwriting and that of his deputies, and he believes they are the records of the court; and of another witness, that he received the records from the clerk of the court as the

[17] R. v. Ward, 6 C. & P. 366; Accord. Giles v. Siney, *infra.*

[18] R. v. Yeoveley, 8 Ad. & El. 806.

[19] Suydam v. Aldrich, 3 McLean, (U. S.), 383.

In a Missouri case, the declaration alleged that the plaintiff recovered his debt, $1,000, and his damages, $32.19, and his costs, and averred that his costs amounted to $13.90, and concluded with a *pro ut patet recordum.* The plea was *nul tiel record.* A record was offered in evidence, showing the amount of the debt and damages without showing the amount of the costs. Below the certificate of the clerk and the seal of the court was a taxation of costs, amounting to the sums averred in the declaration. The record was rejected on the ground of variance. The same record, when offered in evidence for the recovery of the debt and damages, without costs, was also rejected. Wash v. Foster, 3 Mo. 205. Thus, where the declaration described a judgment recovered at ———, in the county of Richmond, in the State of New York, by and before the Supreme Court of judicature for said county and State, the exemplification produced was a judgment rendered by the supreme court of judicature of the people of the State of New York, at the city of Albany, it was held that the record offered in evidence was not admissible under the plea of *nul tiel record.* Pearsall v. Phelps, 3 Ala. 525.

[20] Bumpass v. Webb, 3 Ala. 109.

[21] Eslava v. Elliott, 5 Ala. 264.

records of the suits to which they relate.[22] Where the records have been destroyed except the judgment-book, parol evidence of the pleadings, etc., is not admissible without a certified copy of the judgment.[23] When all the necessary papers to constitute the judgment-roll in a foreclosure action existed, but were never attached together in the form of a roll, it was held that they were admissible in evidence in support of a title to property acquired under a sale thereof as directed by the judgment therein.[24] Evidence is admissible to show the particular day on which a judgment was rendered, when the record is of a term generally, and the particular day becomes material to the rights of parties.[25] A transcript of the record of a replevin suit without the date of the writ, is conclusive evidence of the right of property of the plaintiff, at the date of judgment only.[26]

A record imports absolute verity, and must be tried by itself. It must be complete and perfect in itself without reference to extraneous circumstances. If deficient or imperfect, it cannot be assisted or aided by evidence *dehors* the same. So, where a record of a judgment against lands for taxes unpaid, does not state in

[22] Lyon v. Bolling, 14 Ala. 753.

[23] Nims v. Johnson, 7 Cal. 110.

[24] Sharp v. Lumley, 34 Cal. 611.

[25] Young v. Renyon, 2 Day (Conn.), 252.

[26] Sexton v. Brock, 15 Ark. 345.

The plaintiff, in an action on a judgment, offered in evidence a writ and declaration returnable to a justice of the peace, with regular service indorsed thereon, and the following minutes in the handwriting of the justice, viz.: "Court fees paid. Plea, general issue, *non assumpsit*, and issue. Continued 26th September, 1836. Damages, $5.75. Court 50 cts. Attendance, $1" (and other items of a bill of costs, amounting to $4.23); and also an execution counting on a judgment between the parties to the writ, recovered before the same justice, for the same sums of debt and costs, and signed by the justice, with a return of *non est inventus* thereon. It appeared that the justice died in July, 1837. It was held that these writings did not constitute or show a record of a judgment rendered; and that, there being no proof of a record once existing and lost, they were not admissible as a legal substitute for such proof. Davidson v. Murphy, 13 Conn. 213. In Maine, in a suit upon a judgment recovered before a justice of the peace, the plaintiff is bound to establish the existence of the record; and for that purpose it is not sufficient to introduce a book alleged to contain the record, without some proof of its authenticity. Wentworth v. Keizer, 33 Me. 367. In Indiana, a judgment of a justice of the peace should be signed, in order to be admissible in evidence. Ringle v. Weston, 23 Ind. 588. In Missouri, it may be proved by parol that the transcript of a judgment, obtained before a justice of the peace, was filed in the county court, and that the county court allowed the amount of the judgment so filed. The records of the county court reciting the transcript may be read without producing the transcript. Huston v. Becknell, 4 Mo. 39.

what year or in what term it was rendered, the sheriff's deed must fall for want of a foundation to rest upon.[27] But in all cases the question as to the jurisdiction of the court rendering it, may be inquired into, and if it has no jurisdiction, the judgment is a nullity, and therefore of no value as evidence.[28] A copy of the case, made by the presiding justice of the court of common pleas, and transferred to the superior court, being the case upon which the judgment in the last named court was rendered, and the foundation of the final judgment is proper evidence to show what matters were litigated and decided in the suit.[29] Where a record of a prior judgment is competent evidence in a cause, irregularity or error in that judgment cannot be objected to or inquired into on the trial.[30] A record of conviction is not invalid because the judge who signed it received his appointment after the conviction took place.[31] The judgment-roll in a partition suit is admissible in evidence, in an action in ejectment, to show title in the palintiff, although it was not signed and docketed until after the commencement of the action.[32] Where the date of a judgment is prior to those of the trial and verdict, it will be considered a mere clerical error, and be no objection to the admission of the judgment in evidence, in an action against the sheriff for taking insufficient sureties on the writ of replevin.[33] A record of a judgment recited that the court entered judgment for, etc. It was held that this was as good as if it recited that it was adjudged by the court, etc., as it *prima facie* showed a judgment, which was enough, until the record was impeached.[34]

Sec. 220. Proof of Foreign Judgments.

A judgment duly verified by a seal proved to be that of a foreign court will be presumed to be regular and agreeable to the laws of the State or country where it was rendered, until the con-

[27] Young v. Thompson, 14 Ill. 380; Douglass v. McKenire, 19 Conn. 489; Galloway v. McKeiten, 5 Ired. L. (N. C.) 12; Farley v. Budd, 14 Iowa, 289; Daws v. McMichael, 6 Paige, Ch. (N. Y.) 139; Willard v. Whitney, 49 Me. 235.

[28] Custis v. Georgetown, etc., T. Co., 2 Cranch (U. S. C. C.), 81; Lincoln v. Lamer, 2 McLean (U. S. C. C.), 473; Wistervelt v. Lewis, 2 id. 473.

[29] Brackett v. Hoitt, 20 N. H. 257.

[30] Stothoff v. Dunham, 19 N. J. L. 181.

[31] Stevens v. People, 1 Hill (N. Y.), 261.

[32] Lynch v. Rome Gas Light Co., 42 Barb. (N. Y.) 591.

[33] Myers v. Clark, 3 W. & S. (Penn.) 535.

[34] Vilas v. Reynolds, 6 Wis. 214.

trary is shown.[1] A State has power to prescribe the mode of authentication of foreign records in its courts, which power is concurrent with the power of congress, exercised by U. S. Rev. Sts., and a record certified under either mode is admissible in evidence.[2] A judicial record from another State not authenticated as required by act of congress, is not admissible in evidence.[3] The proper method of proving it is by an exemplified copy, although it may be proved by an examined copy, or by a certified copy, although in the latter case the certificate must be authenticated,[4] either by the certificate of the judge of the court, or by a witness who saw the clerk affix the seal of the court thereto, and attest the copy with his own name.[5] If the court has no seal, the fact may be shown.[6] If the copy is authenticated by the judge of the court, his handwriting must be proved,[7] which it has been held may be done by the certificate of a notary public.[8] A transcript of a record of a foreign judgment is sufficient if signed by the judge and clerk by their initials only of their Christian names and their surnames in full where the statute requires only that they be "signed" without specifying further.[9] The seal of the court, if it has one, *must be affixed to the record itself,* and it is not sufficient that it is annexed to the certificate of the judge of the court authenticating the attestation of the clerk who certifies the record.[10] In an action on a foreign judgment the jurisdictional facts must appear affirmatively from the record. But where due service did not appear in the record of the judgment the foreign court may amend its judgment to correspond with the fact by showing service and then suit can be brought upon the judgment roll as amended,[11] and a copy purporting to contain the entire record of a court of another State will be presumed to be such.[12] When the record is under seal, it is evidence that the court rendering the judgment is a court of

[1] Ellis Estate, *In re*, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514.

[2] Thrasher v. Ballard, 33 W. Va. 275, 10 S. E. 411, 25 Am. St. Rep. 894.

[3] Lehmann & Co. v. Rivers, 110 La. 1077, 35 So. 296.

[4] Church v. Hubbart, 2 Cranch (U. S.), 238.

[5] Buttrick v. Allen, 8 Mass. 273.

[6] Packard v. Hill, 7 Cow. (N. Y.) 434.

[7] Henry v. Adley, 1 Camp. 63.

[8] Yeaton v. Fry, 5 Cranch (U. S.), 335.

[9] Old Wayne Mut. Life Assn. v. McDonough (Ind., 1905), 73 N. E. 703.

[10] Turner v. Waddington, 3 Wash. (U. S.) 126.

[11] Cunningham v. Spokane Hydraulic Mining Co., 20 Wash. 450, 55 P. 756, 72 Am. St. Rep. 113.

[12] Shilling v. Seigle, 207 Penn. 281, 56 A. 957.

record.[13] If the final record in a cause has been made up, the original papers are not admissible as evidence.[14] But until the record has been made up, the writ, and all original papers on file in the clerk's office, are admissible in the same court.[15] In Maine, it is held that either the records of inferior courts of that State, or duly authenticated copies thereof, or the original papers, are admissible as evidence.[16] The whole record should be produced, although only a part of it need be used.[17] The records of one county court brought into another court by the county clerk of that county, are admissible without further proof of their genuineness, but not if they find their way into another county and are brought into court by some other person. Judicial proceedings before a justice of the peace, in North Carolina, are held not to prove themselves, like records, but parol evidence may be introduced to show that they are void.[18] Summary and early records of the court are admissible in evidence.[19] And generally, the pendency of a suit in a court of record can only be proved by record evidence.[20] The circuit court of the United States is not a foreign tribunal, so as to require its judgments to be proven as facts, but its judgments under its seal are admissible in evidence, the seal proving itself like the seal of a State court.[21]

Sec. 221. Between what Parties Admissible.

A judgment is only conclusive upon the parties thereto, and their privies; that is, between the parties and those united with them in interest. By *privity* is meant mutual or successive relationship to the same rights of property, whether is grows out of a contract, the operation of law, or kinship.

There are five kinds of privies: privies of blood, such as the heir to the ancestor; privies in representation, as executors or administrators to the deceased; privies in estate between donor and donee, lessor and lessee; privies in respect of contract; and privies on account of estate and contract together. Thus a receiver may

[13] Smith v. Redden, 5 Harr. (Del.) 321.
[14] Brown v. Isbell, 11 Ala. 1009.
[15] Peck v. Sand. 2 Ga. 1.
[16] State v. Bartlett, 47 Me. 396.
[17] Carrick v. Armstrong, 2 Cold. (Tenn.) 265; Walker v. Stewart, 92 Ind. 246.
[18] Carroll v. M'Gee, 3 Ired. L. (N. C.) 13.
[19] Boal v. King, Wright (Ohio), 223.
[20] Smiley v. Dewey, 17 Ohio, 156.
[21] Williams v. Wilkes, 14 Penn. St. 228.

be called the privy of the plaintiff by representation.[1] The representatives of parties to a suit are bound by the judgment;[2] so are the heirs of such parties;[3] but not where the heirs inherited after suit brought and before decree.[4] The proceedings subsequent to the death of the party are void unless his heirs are brought in.[5]

It follows, as a necessary and invariable rule, that a judgment is not admissible to establish or defeat the essential right of others than the parties indicated.[6] Either party to the record, however, may use it to establish a material fact in another suit between them;[7] but, unless the judgment is directly between *the same parties, or constitutes a part of the res gestae* out of which the action in which it is sought to use it grew,[8] it is not admissible. Thus, in an action of slander against a *husband,* a judgment in a former suit between the plaintiff and the husband and his wife for the same slander, it was held not to be admissible;[9] and the reason is,

[1] Tinkham v. Borst, 24 How. Pr. (N. Y.) 246; see, also, Goddard v. Benson, 15 Abb. Pr. (N. Y.) 191.

[2] Burhans v. Van Zandt, 13 N. Y. 523.

[3] Wood v. Byington, 2 Barb. Ch. (N. Y.) 387.

[4] Requa v. Holmes, 16 N. Y. 193.

[5] Washington Ins. Co. v. Slee, 2 Paige Ch. (N. Y.) 365; Kelly v. Hooper, 3 Yerg. (Tenn.) 395; 9 Wend. (N. Y.) 649.

There is at common law no privity between an executor and the administrator *de bonis non cum testamento annexo,* and a judgment recovered by the former will not bar a suit brought by the latter; Grout v. Chamberlin, 4 Mass. 611; and where the administrator recovers a judgment and dies, the succeeding administrator may bring a new action. Pastal v. Wards, Latch, 140; Barnhurst v. Yelverton, Yelv. 83; Gates v. Gough, id. 33; Allen v. Irwin, 1 S. & R. (Penn.) 549. Nor is there any privity between an executor or administrator and the heir or devisee of the *land,* and a judgment against the former is not evidence against the latter to charge the real estate. Mason v. Peters, 1 Munf. (Va.) 437; Deneale v. Archer, 8 Pet. (U. S.) 528; sgood v. Manhattan Co., 3 Cow. (N. Y.) 612; Neal v. M'Combs, 2 Yerg. (Tenn.) 10. Whether there is any privity between an executor or administrator and a legatee of *personals—quere.* Mason v. Peter, *supra,* and see a note to that case by the reporter. See Goddard v. Benson, 15 Abb. Pr. (N. Y.) 191.

A decree for the specific execution of a covenant real in a suit commenced by the covenantee, and afterward revived in favor of his heirs, is no bar to a suit brought by the administrator of the covenantee to recover damages for the breach of such covenant, if he was not made a party to the suit. The covenantor has no means of relieving himself from the double burden of executing the agreement and paying damages for the breach, in such case, save by resorting to a court of equity. Combs v. Tarlton, 2 Dana (N. Y.), 474.

[6] Jackson v. Vedder, 3 Johns. (N. Y.) 8; Simson v. Kennedy, Harp. (S. C.) 370; Fowler v. Collins, 2 Root (Conn.), 231; Banks v. Sharp, 6 J. J. Mar. (Ky.) 180.

[7] James v. Buzzard, 1 Hempst. (Tenn.) 240.

[8] Wells v. Shipp, 1 Miss. 353.

[9] Magauran v. Patterson, 6 S. & R. (Penn.) 278. That the parties must be the same, see Strutt v. Bovington, 5 Esp. 56; Morse v. Williams, C. & M. 615; Blakemore v. Glanmorgan Canal Co., 2 C. M. & R. 133; Smith v. Webber, 1 Ad. & El. 118.

because neither the parties to, nor the ground of, the action are the same.[10]

The rule is that a record of one suit cannot be read in another as evidence, unless both parties or those under whom they claim, were parties to both suits, upon the ground that a document cannot be used against a party who could not have availed himself of it, had it been made in his favor.[11] A judgment against the principal is not conclusive upon a surety who was not made a party to the suit.[12] Where, for the reasons stated, a judgment cannot be used against a party, it cannot be used in his favor.[13] The fact that an appeal is pending from a judgment, or a motion for a new trial, does not defeat its force or admissibility as evidence; *until actually reversed, it is conclusive against the parties.*[14] There are instances in which a record is admissible against a party to it, in favor of one who is not, *to show his acts;* as, that his possession of a tract of land extended to a particular boundary.[15]

So records may be admitted in suits not between the same parties or privies, *where upon the facts of the trial and the recoveries in such records, the interests of others hang as incidents or consequences.* The term "parties" includes those who are directly interested in the subject-matter of the suit, knew of its pendency and had the right to control and direct or defend it.[16] One who is not a party to the record, whose counsel is present and participates in the trial of a suit against his agent, is not bound by a judgment rendered in that suit.[17] Where a head of a family represents its members as to homestead in such sense as to be a trustee for them as beneficiaries they would ordinarily be bound by a judg-

[10] Killingsworth v. Bradford, 2 Overt. (Tenn.) 204; Paynes v. Coles, 1 Munf. (Va.) 373; Chapman v. Chapman, 1 Munf. (Va.) 398.

[11] Paynes v. Coles, 1 Munf. (Va.) 373.

Thus a suit by A. against B., on the death of A., was revived by C. and D., his brothers and heirs; and it was held that the record of a former suit by C. against B., in which the same identical point was in controversy, was not admissible in evidence, A. not claiming title under C. Chapman v. Chapman, 1 Munf. (Va.) 398.

[12] Clark v. Montgomery, 23 Barb. (N. Y.) 464; Thomas v. Hubbell, 15 N. Y. 405.

[13] Chites v. Conley, 2 Dana (Ky.), 21.

[14] Under a statute providing that no appeal was to affect a judgment, a judgment is binding pending the appeal. Watson v. Richardson, 110 Iowa, 698, 80 N. W. 416, 80 Am. St. Rep. 331; Chase v. Jefferson, 1 Houst. (Del.) 257.

[15] Smith v. Shackleford, 9 Dana (Ky.), 452.

[16] Courtney v. William Knabe & Co., Mfg. Co., 97 Md. 499, 55 A. 614, 616.

[17] Bridges v. McAlister, 106 Ky. 791, 51 S. W. 603, 90 Am. St. Rep. 267.

[18] Central Baptist C. & S. v. Manchester, 17 R. I. 492, 23 A. 30, 33 Am. St. Rep. 893.

ment against him relating to the homestead, although they were not parties to the proceeding. This rule, however, does not apply if the plaintiff knew that the trust estate was not liable, but nevertheless brings the suit for the purpose of charging the trust estate with the payment of a debt for which the trustee is only personally liable; and in such cases, to render a judgment having that effect conclusive upon the beneficiaries of the trust, it must appear that they were *sui juris* and were parties to the suit or consented to the judgment.[19] In an action by a corporation to recover for a subscription of stock where it was claimed by the defendant that the corporation was never properly organized, a judgment against the corporation in an action against another stockholder is not conclusive. A corporation in bringing suit against a stockholder does not represent the stockholder and neither does it represent other stockholders and hence the prior judgment was not against the same parties or their privies.[20] A valid judgment rendered against a county on a matter of public importance is binding upon all its citizens although they are not parties to the suit.[21] In such instances the production of such a record is proof that the suit was brought and the recovery had as therein set forth, but the consequences to others resulting from those facts apparent from the face of the record, are to be established by appropriate evidence of such other facts as may be necessary to sustain the action or defense.[22] The doctrine that a judgment is binding upon privies as well as parties, applies only as to the particular matter involved in the judgment.[23] A decree enjoining defendants or their grantees and successors from diverting any of the waters of a stream is binding upon a grantee of the defendant who is therefore his

[19] Snelling v. American, etc., Mort. Co., 107 Ga. 852, 33 S. E. 634, 73 Am. St. Rep. 160.

[20] Nickum v. Burkhardt, 30 Ore. 464, 47 P. 788, 48 P. 474, 60 Am. St. Rep. 822.

[21] Bear v. Board of County Commissioners Brunswick County, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711.

[22] Key v. Dent. 14 Md. 86.

[23] In a recent case in Wisconsin the plaintiffs brought suit against the deputy sheriff for goods the plaintiffs had sold to one Nelson under a sale claimed to be fraudulent, the deputy sheriff having seized the goods as goods of Nelson on behalf of another creditor. It was held that the judgment in the action by the plaintiffs against Nelson for damages on account of part of the goods which he had sold before the levy by the deputy sheriff is inadmissible in the later action. Although the deputy sheriff is a privy in title as claiming under Nelson in one sense still it is only as to the goods he holds and as to other goods he is not a privy of Nelson. Hart v. Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

privy in estate.[24] In a proceeding for condemnation of certain liquors found in the possession of the defendant, it is open to him to prove his acquittal on the charge of keeping liquors with unlawful intent and to show that both proceedings related to the same liquor. Although the proceeding to condemn is in its nature a proceeding in *rem*, when one comes in as a claimant it is as to him a proceeding *inter partes* and he is entitled to the benefit of a previous adjudication in a proceeding between himself and the State.[25] A judgment approving an executor's final account is *res inter alios actae* and not admissible against one not a party to it.[26] A judgment which establishes a debt against the estate of a deceased person is as conclusive on the heir as on the administrator where both the real and personal property is liable to be subjected to the payment of the debt. Where the judgment is rendered against the estate, it is in all its essential incidents and consequences a judgment in *rem* which is binding on the whole world.[27] The allowance of a creditor's claim against the estate of a deceased person in the Probate Court may be attacked collaterally in any proceeding to subject the lands of an heir or devisee to the payment of the claim, as the administrator in paying debts out of personalty, with the possibility of using the real estate for that purpose occupies a position rather antagonistic to the heirs.[28] A judgment of a probate or other court of competent jurisdiction as to the amount due from a guardian to his ward is conclusive against his sureties.[29] A decree of divorce adjudging certain property to be homestead is not evidence in an action between one of the parties to the divorce suit and a stranger.[30] A privy in estate is not bound by a judgment or decree against him from whom he derives his estate, rendered after he derives it, merely because of such privity.[31] An infant, as a general rule, is as much bound by a decree against him as a person of full age, and

[24] Ahlers v. Thomas, 24 Nev. 407, 56 P. 93, 77 Am. St. Rep. 820.

[25] State v. Adams, 72 Vermont, 253, 47 A. 779, 82 Am. St. Rep. 937.

[26] Long v. Metzger, 206 Ill. 475, 69 N. E. R. 493.

[27] Moody v. Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604.

[28] Black v. Elliott, 63 Ka. 211, 65 P. 215, 88 Am. St. Rep. 239. See, also, Giddings v. Steele, 28 Tex. 733, 91 Am. Decisions, 336.

[29] Cross v. White, 80 Minn. 413, 83 N. W. 393, 81 Am. St. Rep. 267; Botkin v. Kleinschmidt, 21 Mont. 1, 52 P. 563, 69 Am. St. Rep. 641; Deegan v. Deegan, 22 Nev. 185, 37 P. 360, 58 Am. St. Rep. 742.

[30] Roulston v. Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97.

[31] Maxwell v. Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

can impeach it only on grounds which would invalidate it if rendered against an adult.[32] Parties still unborn at the time of a decree, and having contingent interests, are bound by it as they are conceived to be virtually represented by those in possession.[33]

Sec. 222. Judgment Conclusive of Fact Recorded; Collateral and Direct Attack.

Judgments and verdicts in the superior courts are always of record. They have, therefore, the character which belongs to all records, that they are not to be contradicted by evidence. A former judgment is conclusive of the matters decided, although the law was incorrectly applied,[1] and although some of the objections were not raised in objection to the first judgment. The questions that are *res judicata* are not confined to those raised and insisted upon at the former judgment, but they embrace also those in issue which might have been insisted upon.[2] A prothonotary who has entered judgment in accordance with the power given to him will not be allowed to contradict his record by showing that it was really made on a different day from that set out in the record in any collateral proceeding in which the judgment is called in question.[3] The presumption is that the record correctly states the date of the judgment where it is claimed that the judgment was entered *nunc pro tunc*.[4]

Jurisdiction will be presumed although no mention of certain

[33] Harrison v. Walton's Ex'r., 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830.

[33] Harrison v. Walton's Ex'r., 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830. The same result is reached by the appointment of a guardian *ad litem* for unascertained interests under a statute in Massachusetts. Loring v. Hildreth, 170 Mass. 328, 49 N. E. 652, 64 Am. State Rp. 301.

[1] Hodson v. Union Pacific Ry. Co., 14 Utah, 402, 47 P. 859, 60 Am. St. Rep. 902.

[2] Gross v. People, 193 Ill. 260, 61 N. E. 1012, 86 Am. State Rep. 322, and cases cited in note page 325.

[3] Kostenbader v. Kuebler, 199 Pa. State, 246, 48 A. 972, 85 Am. St. Rep. 783.

If a verdict finding several issues is produced in evidence the opposite party will not be allowed to show that no evidence was offered on one of the issues, and that the verdict as to that issue was indorsed on the *postea* by a mistake. Reed v. Jackson, 1 East, 355. On an indictment for assisting the escape of a convict out of prison, if the record of the conviction is produced by the proper officer, evidence is not admissible to dispute the statement in the record, or to show that it never was filed among the other records of the county; even though the indictment refers to it with a *prout patet*, as remaining among those records. R. v. Shaw, R. & R. Cr. 526.

[4] Missouri, etc., R. & R. Co. v. Holschlag, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417.

facts necessary to give jurisdiction is made in the judgment roll in a domestic judgment when collaterally attacked.[5] The presumption is that an attorney who has entered his appearance for the defendant, had authority to do so and this presumption is conclusive in a collateral proceeding as to the judgment founded on such appearance even where no service is had upon the defendant.[6]

A judgment against a municipality cannot be collaterally attacked on the ground that it is in excess of the debt limit as that was a defense which should have been set up in the judgment.[7] So a judgment cannot be attacked collaterally on the ground that the complaint did not set forth a cause of action,[8] or that it grants relief not demanded,[9] or that the defendant was not given all the time allowed by law after service of the summons in which to plead.[10] But where a bill to quiet title shows affirmatively not only that the plaintiff had no title to quiet, but that title was in the defendant, a decree for the plaintiff is void and may be attacked collaterally under the general rule that where a bill shows no cause of action against the defendant with reference to the subject matter of the suit, tenders no issue with him, but, on the contrary, shows that there could be no issue with him, a decree based upon such bill is a nullity, no matter how attacked.[11]

A judgment can be attacked collaterally only upon inspection of the judgment roll and parol evidence is inadmissible to show that no service was really made as therein stated,[12] and service will be presumed to be sufficient, although the proof of service on file was not sworn to as required by statute,[13] or although an affidavit of service omitted to state that the party serving the sum-

[5] Gulickson v. Bodkin, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352.

[6] Corbitt v. Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

[7] Edmundson v. Independent School District of Jackson, 98 Iowa, 639, 67 N. W. 671, 60 Am. St. Rep. 224.

[8] Altman v. School District, 35 Ore. 85, 56 P. 291, 76 Am. St. Rep. 468.

[9] Mach v. Blanchard, 15 S. D. 432, 90 N. W. 1042, 91 Am. St. Rep. 698. *Contra* Russell v. Shurtleff, 28 Col. 414, 65 P. 27, 89 Am. St. Rep. 216.

[10] Altman v. School District, 35 Ore. 85, 56 P. 291, 76 Am. St. Rep. 468.

[11] Hall v. Melvin, 62 Ark. 439, 35 S. W. 1109, 54 Am. St. Rep. 301.

[12] Haupt v. Simmington, 27 Mont. 480, 71 P. 672, 94 Am. St. Rep. 839. By the return of service the court in fact acquired jurisdiction, for jurisdiction includes the power to hear and determine the questions raised in a case and among these is the question whether the summons has in fact been served. Bennett v. Nelson, 133 Cal. 379, 65 P. 880, 85 Am. St. Rep. 207.

[13] State, etc., Boyle v. Superior Court, Pierce County, 19 Wash. 128, 52 P. 1013, 67 Am. St. Rep. 724.

mons was over 18 years of age as required by statute.[14] Where a summons on which a judgment was founded appears to have been insufficient, it will be presumed that a sufficient summons was subsequently issued and served where there was ample time therefor before the rendition of judgment,[15] and even where after its return there was not sufficient time before the decree for further service.[16] But where the record shows that service was made by publication, the court will not presume that personal service also was made.[17]

A judgment of a federal circuit court may not be attacked collaterally in a State court, but in a suit on such judgment, where the answer sets up that it was obtained by fraud by a collusive transfer to a non-resident to give jurisdiction, the State court will try the question of fraud. The court seems to distinguish between a defense which might have been set up in a suit in which judgment was rendered and a fraud practiced on the court in obtaining jurisdiction of which the defendant had no knowledge.[18] Where a judgment is rendered against two parties jointly liable as principal and surety, and one of the parties is dead at the time of the rendition of the judgment, the judgment is absolutely void against both and can be collaterally attacked.[19] A judgment sounding in tort void as to one of several of the defendants jointly or severally liable is not necessarily void as to all.[20] It has been held in Kansas that a judgment rendered against a defendant after his death is absolutely void and can be attacked collaterally.[21] A judgment against an infant rendered without the appointment of a guardian *ad litem as* required by statute is irregular but not void and not open to impeachment by collateral attack.[22]

A bill in equity may be brought to restrain the prosecution of an action upon a judgment obtained with no service upon the defend-

[14] Burke v. Interstate Savings, etc., Association, 25 Mont. 315, 64 P. 879, 87 Am. St. Rep. 416.

[15] Rogers v. Miller, 13 Wash. 82, 42 P. 525, 52 Am. St. Rep. 20.

[16] Bradley v. Drone, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214.

[17] Latta v. Tutton, 122 Cal. 279, 54 P. 844, 68 Am. St. Rep. 30.

[18] Wonderly v. Lafayette County, 150 Mo. 635, 515 S. W. 745, 73 Am. St. Rep. 474. A judgment procured by fraud or collusion may be questioned even in a collateral proceeding. Atlas National Bank of Chicago v. More, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274.

[19] Weis v. Aaron, 75 Miss. 138, 21 So. 763, 65 Am. St. Rep. 594.

[20] Engstrand v. Kleffman, 86 Minn. 403, 90 N. W. 1054, 91 Am. St. Rep. 359, and note p. 362.

[21] Kager v. Vickery, 61 Kan. 342, 59 P. 628, 78 Am. St. Rep. 318.

[22] Levystein v. O'Brien, 106 Ala. 352, 17 So. 550, 54 Am. St. Rep. 56.

ant although the officer in the original action had fraudulently made a return of due service.[23]

Sec. 223. Not Conclusive on Immaterial Averments.

A record will not be conclusive as to the truth of allegations which were not material nor traversable.[1] Thus a party will not be estopped from averring, in an action of debt on a bond, that the bond was made at A., though in a former action on the same bond he averred it to have been made at B.;[2] nor in the case of a conviction for a felony, where the jury has given a general verdict, the record will not be conclusive that the offense was committed on the day mentioned in the indictment, *for the time is not of the substance of the charge;* and therefore a party interested to dispute a forfeiture (which in the case of real property relates to the time of the offense) may show that the offense was committed on a different day from that alleged in the record.[3]

The record of a judgment or verdict not being liable to contradiction as to the truth of its contents, the question as to its admissibility or effect in evidence must depend on the inferences attempted to be drawn from it. These inferences are sometimes necessary and conclusive, and sometimes optional with juries. Where a judgment is produced merely for the purpose of showing that such a proceeding actually took place (as, upon an indictment for perjury at a trial, with a view of showing that the trial actually took place),[4] the record is conclusive of the fact that the proceeding did take place.

Sec. 224. Effect of Judgment.

The legal consequences arising from the simple fact of a judgment having been pronounced by a court of competent jurisdiction are numerous. In some cases, a judgment constitutes part of a title; in others, it is used merely to show a suit determined, or to let in evidence of what was sworn upon a trial, or to justify

[23] Dowell v. Goodwin, 22 R. I. 287, 47 A. 693. 84 Am. St. Rep. 842. Smoot v. Judd, 161 Mo. 673, 61 S. W. 851, 84 Am. St. Rep. 738.

[1] Co. Lit. 352 b., or on a fact not in issue.

[2] Com. Dig., tit. Estoppel, E., 6.

[3] Ive's Case, 3 Inst. 230; Gilb. Ev. 230. See Co. Lit. 352 b.; and Att. Gen. v. King, 5 Pri. 195.

[4] See R. v. Iles, Ca. temp. Hardw. 118; R. v. Page, 2 Esp. 649 n. See, also, B. N. P. 243; R. v. Gordon, Car. & M. 410.

proceedings in execution of the judgment, or to entitle a partner to contribution, or for some other purpose to which it is properly applicable as a judgment. So a judgment may be used to prove the fact that a party had by process of law been compelled to pay damages to a certain amount;[1] but not to prove the circumstances under which they were paid.[2] A judgment, at least as against strangers to it, does not prove the existence of the debt for which it was rendered before the entry of the judgment.[3] A judgment for the payment of money is *prima facie* evidence of the existence of the indebtedness and the burden of proof is upon the defendant to plead and prove payment.[4] Where a judgment is recovered against two tortfeasors, their liability is *res adjudicata* in a subsequent suit between them for contribution.[5] A judgment between two parties is not binding against the loser in a subsequent action brought by the successful party as assignee of the claim of another against the loser.[6] In a suit on a note given to indemnify sureties on an official bond against a loss suffered by the defalcation of the principal, the judgment against the principal for the amount of his defalcation is evidence in the absence of fraud or collusion of the amount of the defalcation.[7]

[1] Green v. New River Company, 4 T. R. 590.

[2] See by CRESSWELL, J., 6 M. & G. 165.

[3] Hoerr v. Meihofer, 77 Minn. 228, 79 N. W. 964, 77 Am. S. Rep. 674; Simmons v. Shelton, 112 Ala. 284, 21 So. 309, 57 Am. St. Rep. 39.

[4] O'Brien v. Stambach, 101 Iowa, 40, 69 N. W. 1133, 63 Am. St. Rep. 368.

[5] Westfield Gas, etc., Co. v. Noblesville, etc., Co., 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244.

[6] Fuller v. Metropolitan Life Insurance Co. of New York, 68 Conn. 55, 35 A. 766, 57 Am. St. Rep. 84.

[7] Bollin v. Metcalf, 6 Wyo. 1, 42 P. 12, 44 P. 694, 71 Am. St. Rep. 898.

The celebrated judgment of DE GREY, C. J., expressing the unanimous opinion of all the judges, in The Dutchess of Kingston Case, 20 How. St. Tr. 578, gives such a clear and comprehensive view of the general principles applicable to the subject in hand that it will be desirable to give a portion of it here. He said: "What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject it is unnecessary to state them. From the variety of cases relative to judgments being given in evidence in civil suits, it may be stated: First, that a judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, *between the same parties, upon the same matter directly in question in another court.* Secondly, that

Sec. 225. Distinction Between Judgments of Courts of Exclusive and Concurrent Jurisdiction.

A much more conclusive effect is attributed to the judgments of courts of *exclusive* jurisdiction than to the judgments of courts which have only *concurrent* jurisdiction. With regard to *the parties* between whom they are to be used, and the *matter* to which they relate, these two classes of judgments are put upon the same footing, and subject to the same limitation and restriction; the *matter* must be the same, the *parties* also the same. But in one important particular they differ, that is, with reference to the *occasion* and the *manner* in which it is proposed to use them. It is only upon a matter *directly in question* that the judgment of a court of *concurrent* jurisdiction is conclusive—while the judgment of a court of *exclusive* jurisdiction is conclusive, not only when the matter comes in question directly, but also when it comes *incidentally* in question. This difference in the effect of the judgments arises from the difference in the constitution of the courts which pronounce them. When a matter, over which some other court is allowed to have exclusive jurisdiction, comes in question—whether directly or incidentally—and the judgment of such a court is offered in evidence as proof of the matter, it must neces-

the judgment of a court of exclusive jurisdiction, directly upon the point, *is conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose.* But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." This principle is universally acknowledged. See Burrill v. West, 2 N. H. 190; Wood v. Davis, 7 Cranch (U. S.), 271; Davis v. Wood, 1 Wheat. (U. S.) 6; Payne v. Coales, 1 Munf. (Va.) 373; Turpin v. Thomas, 2 H. & M. (Va.) 139; Jackson v. Vedder, 3 Johns. (N. Y.) 8; Case v. Reeves, 14 id. 79; Ryer v. Atwater, 4 Day (Conn.), 431; Killinsworth v. Bradford, 2 Overt. (Tenn.) 204; Wood v. Stephen, 1 S. & R. (Penn.) 175; Estep v. Hutchman, 14 id. 435; Tabor v. Perrott, 2 Gall. (U. S.) 565; Twambly v. Henley, 4 Mass. 441; Respublica v. Davis, 3 Yeates (Penn.), 128; Johnson v. Bourn, 1 Wash. (U. S.) 187; Stevelie v. Read, 3 Wash. (U. S. C. C.) 247; Cleaton v. Chambliss, 6 Rand. (Va.) 86; Neal v. McComb, 2 Yerg. (Tenn.) 10, 12; Blount v. Darrach, 14 S. & R. (Penn.) 184, 186, note; Este v. Strong, 2 Hamm. (Ohio) 401; Fisk v. Weston, 5 Me. 410; Cowles v. Harts, 3 Conn. 516; James v. Stookey, 1 Wash. (U. S. C. C.) 530; Chapman v. Chapman, 1 Munf. (Va.) 398; Frazier v. Frazier, 2 Leigh (Va.), 642, 650; Munford v. Overseers, 2 Rand. (Va.) 313, 318; Floyd v. Mintsey, 5 Rich. (S. C.) 361; Riggins v. Brown, 12 Geo. 271; Persons v. Jones, id. 371; Michan v. Wyatt, 21 Ala. 813; Fallon v. Murray, 16 Miss. 168; Duncan v. Helms, 8 Gratt. (Va.) 68. See, also, Rapelye v. Prince, 4 Hill (N. Y.), 119; Alexander v. Taylor, 4 Denio (N. Y.), 302.

sarily be *conclusive;* implicit credit must be given to a court so constituted, while its judgment is unreversed and in full force; for the court in which the particular matter is to be proved has no authority to examine into the merits of the judgment, and must take the matter as judicially and conclusively decided.

Sec. 226. Judgments In Rem.

There is another class of judgments which are technically termed judgments *in rem;* and these are conclusive, not only as against parties and privies, but also as against strangers. A judgment *in rem* may perhaps be defined to be the judgment of a court of exclusive or at least peculiar jurisdiction, declaratory either of the nature and condition of some particular thing, or of the condition and *status* of some particular person.[1]

A judgment *in rem* in our law may properly be so termed when it is the sentence of a court declaring the nature or quality of a particular *thing; e. g.,* the decision of the court of admiralty de-

[1] This definition is by no means put forward as a perfect one. Mr. Smith defined a judgment *in rem* to be "an adjudication (as its name indeed denotes) upon the *status* of some particular subject matter, by a tribunal having competent authority for that purpose." Smith's Lead. Ca. 439. And he takes exception to the inference to be drawn from some dicta, that such a judgment must be one of a court of *exclusive jurisdiction.* "The universal effect," he says, "of a judgment *in rem* depends, it is submitted, on this principle, viz., that it is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; *which very declaration operates accordingly upon the thing adjudicated upon,* and *ipso facto* renders it such as it is thereby declared to be." And he afterward says: "And it is submitted, that this must be Lord COKE'S meaning where he states in 1 Inst. 325 b. that 'where the record of the estoppel doth run to the disabilitie or legitimation of the person, there all strangers take benefit of that record, as *outlawrie, excommengement, profession, attainder of praemunire, &c., felonie, &c., bastardie, mulicrtie,* and shall conclude the parties, *though they be strangers to the record.*' In all these cases, it will be observed, the record operates upon the *status* of the individual." But it is also to be observed, that in all these cases, the judgment is that of a court of exclusive, or at least, peculiar jurisdiction.

The term "judgment *in rem* is, perhaps, in strictness, objectionable when applied to the *status* of a *person.* The term itself is probably derived from the civil law, where actions were classed as *actiones in personam* and *actiones in rem;* the former including actions upon contract or for injuries ("*ex contractu vel ex maleficio*"); the latter referring to actions in which some particular thing was the subject-matter of the controversy ("*cum movet alicui de aliqua re controversiam*"). Inst. lib. 4, tit. 16, § 1. The distinctive difference between these actions and our "personal and real actions," is known to every lawyer. Under the Roman law, therefore, a judgment *in rem,* generally, was "*ut rem ipsam restituat (possessor) cum fructibus.*" Inst. lib. 4, tit

claring a vessel to be a lawful prize; or a judgment of condemnation for forfeiture, under the excise laws by the court of exchequer. Where, however, the judgment declares the condition or *status* of a *person,* it would seem to be more properly termed a judgment *quasi in rem.*

Sec. 227. Proceedings Between Strangers.

Proceedings between persons who are strangers to the suit are considered *res inter alios actae;* and they are not admissible, even though they are offered not for the purpose of binding a party to the suit, but merely as evidence of some collateral fact.

Sec. 228. Rule With Reference to Real and Nominal Parties.

But in the same manner as admissions may be used against the real parties to a suit, though they are not the nominal parties to the record, it has been held that verdicts and judgments are receivable in evidence against the parties on whose account the suits in which the judgments were obtained were instituted or defended.[2]

Sec. 229. Rule as to Judgment in Ejectment.

Upon the ground that the lessor of the plaintiff and the tenant are substantially the real parties to an ejectment, a judgment in ejectment is admissible evidence in an action *for mesne profits,* and this, whether the action be brought by the nominal plaintiff, or by the lessor of the plaintiff, and whether the judgment be upon verdict or by default; but the judgment is not conclusive, unless pleaded by way of estoppel.[1] It seems to be settled also, that a

[2] Upon this principle, the equitable assignee of a chose in action has been estopped by a verdict and judgment thereon, in the same manner as if he were a party to the record, the suit having been prosecuted in the name of another for his benefit, and at his request and expense. Rogers v. Haines, 3 Me. 362. Where the same person was, in fact, a party to the former suit, having been sued by a wrong name, the mere misnomer is not sufficient to prevent the admission of the record in evidence; the parol proof will be received to show that notice in the former suit was served upon the party in the latter, though the name was different, and that he appeared in such suit and attended the taking of depositions therein. Stevelie v. Reid, 2 Wash. (U. S. C. C.) 274. *Contra,* Allen v. Hall, 1 Marsh. (Ky.) 526. The former judgment is not admissible unless rendered in an action between the same parties. Mersereau v. Pearsall, 19 N. Y. 108.

[1] Doe v. Huddart, 2 C. M. & R. 316. And see Lewes v. Preece, 1 Tyrw. 410; B. N. P. 87, 232; Doe v. Har-

judgment recovered by the defendant against the same lessor of the plaintiff in a former ejectment, is admissible in evidence on the trial of a second ejectment by the same lessor of the plaintiff.[2] A judgment is in no case conclusive, unless pleaded by way of estoppel. It could not be pleaded in ejectment, because the defendant is bound by the terms of the consent rule to plead not guilty; but if the parties are the same, it is evidence to go to the jury. A landlord is not bound by a judgment against his tenant in ejectment brought *to try title,* although the tenant's attorney was employed by the landlord and the tenant took no part in the case, if the landlord did not appear as a party of record.[3]

A judgment in ejectment for the plaintiff covering certain land is not evidence in a subsequent action between the same parties concerning other land which was claimed in the first action and which was omitted from the verdict as appears by parol testimony because the plaintiff failed to prove title to it. This land is not included in the judgment and therefore the judgment cannot be a bar as to it.[4]

Sec. 230. When the Parties are the Same, but not Suing in the Same Right.

Though the individual be the same in the two suits, yet if he stood in a different relation or character on the two occasions, he will not be affected by a verdict or judgment in the first suit. This doctrine has been established in regard to estoppels.[1] A judgment against a party in his individual capacity is not binding upon

low, 12 Ad. & El. 42, *n.* In ejectment between A. & B., the record of a former judgment in an action of trespass between B. and the *cestui que trust* of A., has been held admissible in Pennsylvania. Calhoun's Lessee v. Dunning, 4 Dall. (Penn.) 120. This was upon the ground that the parties were really, though not nominally, the same in both suits. See Rogers v. Haines, 6 Greenl. 362, cited *ante,* note, 255. The omission to strike out the name of the casual ejector, and insert that of the real defendant, is amendable after verdict; and if the real defendant enters into the common rule, proceeds to trial, &c., the judgment will be as conclusive against him as if the issue had been corrected. Bailey v. Fairplay, 6 Binn. (Penn.) 405.

[2] Strode v. Seaton, 2 C., M. & R. 731. See B. N. P. 232; 4 Bac. Ab., tit. Evidence, F. See, also, Wright v. Tatham, 1 Ad. & El. 19.

[3] Loftis v. Marshall, 134 Cal. 394, 66 P. 571, 86 Am. St. Rep. 286.

[4] Lake v. Hancock, 38 Fla. 53, 20 So. 811, 56 Am. St. Rep. 159.

[1] A woman is not estopped, after coverture, by an admission on record by her husband and herself during coverture; and an heir, claiming as heir of his father, is not estopped by

him in another suit involving the same facts in which he appears in a representative capacity, so a judgment against one sued in a representative capacity does not bind him in a subsequent action brought by or against him as an individual.[2] Where a wife brings suit for personal injuries and her husband is joined as a nominal party, the judgment in that suit is not a bar to another suit by him in his own right, for loss of the services of his wife, resulting from the injury. This case was decided under the general rule that no party is bound by a judgment unless his opponent would have been affected by it adversely if it had been determined the other way.[3] A judgment against a party as trustee is not binding upon him in a subsequent suit against him as guardian.[4] A judgment for the defendant in a suit brought in the name of a father for personal injuries suffered by his minor son, is not a bar to a subsequent suit brought by the father in his own right for loss of services and medical expenses of his son arising out of the same accident.[5] The general rule does not apply to a case where the plaintiff uses a record in a former suit against the defendant, whom he is suing for negligence as his servant or agent, not to prove the fact of the injury or negligence (for the record is not admissible for that purpose), but merely to prove the amount of damages which he has been compelled by law to pay to another person (the plaintiff in the former recorded suit).[6]

an estoppel upon him as heir to his mother. Com. Dig., tit. Estoppel, C. A party suing as executor in an action of debt upon a bond will not be estopped by having been barred in an action upon the same bond when he sued as administrator; but he may show that the letters of administration have been since repealed. Robinson's Case, 5 Coke, 32 *b*.

[2] First National Bank v. Shuler, 153 N. Y. 163, 47 N. E. 262, 60 Am. St. Rep. 601; Sonnenberg v. Steinbach, 9 S. D. 518, 62 Am. St. Rep. 885.

[3] Walker v. City of Philadelphia, 195 Penn. St. 168, 45 A. 657, 78 Am. St. Rep. 801.

[4] State v. Branch, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533. See, also, Morrison v. Clark, 89 Maine, 103, 35 A. 1034, 56 Am. St. Rep. 395.

[5] Bamka v. Chicago, etc., Ry. Co., 61 Minn. 549, 52 Am. St. Rep. 618, 63 N. W. 1116.

[6] Green v. New River Company, 4 T. R. 590. See, also, Pritchard v. Hitchcock, 6 M. & G. 164.

In debt by A. against B. and C., on a joint and several bond, the condition of which, after reciting that C. had been appointed collector of taxes, and that A. had agreed to become his surety, was that B. and C. should indemnify A. from all costs and charges which he should incur in consequence of his becoming such surety; the declaration alleged that C. had made default in not paying over a sum of money to the receiver-general, and assigned for breach, that by reason of such default A. had been compelled to pay £500 to the receiver-general; it was held that the mere production of a judgment signed against A., *under a judge's order*, for £500, at the

Sec. 231. As to What Matters a Judgment Concludes a Party.

A judgment concludes the parties only *as to the grounds covered by it and the facts necessary to uphold it.* They will not be allowed to prove what is inconsistent with its rectitude and justice, for while it stands unreversed, it is final as to the points decided; not so, however, with respect to matters which the judgment itself shows were not in question; and hence, where the cause has gone off upon some defect which precluded an inquiry into the merits, the judgment is usually no bar to a second action. So the reversal of a judgment proves nothing but its own correctness; it operates no farther than to nullify what has been done; and in other respects the parties are generally left by it in the same situation, as to their rights and remedies touching the matter in controversy, as if no such judgment had ever existed. Therefore, where a decree of the supreme court of probate reversed that of the inferior court decreeing distribution, such reversal was held no bar to a bill in chancery for the same matter.[1] And upon the same principle the dismissal of a bill in chancery is not always conclusive as to the complainant's right in a court of law, although the bill may have been filed for the same matter; for if the complainant seeks in a court of equity to enforce a strictly legal title when his remedy is at law, the dismissal of the bill amounts merely to a declaration that he has no equity; but it casts no reflection upon his legal title, it decides nothing in relation to it and consequently can conclude nothing.[2] And though a decree in express terms professes to affirm a particular fact, yet if such fact was immaterial in the case, the decree will not conclude the parties in relation to it.[3]

Where the cause and object of both actions are the same, a judgment in the prior bars the subsequent suit. Where the cause or object of the actions are different, though the point in dispute is the same in both, the prior judgment is no bar to the subsequent action, but the verdict is matter of evidence to prove such point.

suit of the receiver-general, was not evidence of the amount of damage sustained by A. in consequence of his suretyship. King v. Norman, 4 C. B. 884.

[1] Harvey v. Richards, 2 Gall. (U. S.) 210.

[2] Lessee of Wright v. Deklyne, 1 Pet. (U. S. C. C.) 198; Pleasants v. Clements, 2 Leigh (Va.), 474, 483. See Burchet v. Faulkner, 1 Dana (Ky.), 99, 100; Lancaster v. Laire, id. 109.

[3] Hotchkiss v. Nichols, 2 Day, 138; Coit v. Tracy, 8 Conn. 268; People v. Johnson, 37 Barb. (N. Y.) 502.

But although a prior judgment may be no *bar,* strictly and technically speaking, where the cause or object of both actions are not identical, it does not follow that either party in the second action can be allowed to contradict what was expressly adjudicated in the first.[4]

Indeed the principle will be found to run through nearly all the American cases, that the judgment of a court of competent

[4] Betts v. Starr, 5 Conn. 550.

In a case before the United States Supreme Court, Hopkins v. Lee, 3 Wheat. (U. S.) 109, the facts were that Lee sold Hopkins an estate, called "Hill and Dale," then under certain incumbrances, which Lee agreed to remove; and Hopkins was to pay therefor $1,800, partly in military lands and partly in some other way, as soon as the incumbrances were removed. Hopkins filed a bill in chancery against Lee, stating that Lee had omitted to pay the incumbrances, and that he, Hopkins, had been compelled to pay them. Upon hearing the bill, the court found that Hopkins had satisfied the incumbrances, but with the funds of Lee, advanced for that purpose, and thereupon decreed that Hopkins should pay Lee the overplus remaining in his hands after paying off the incumbrances. Lee then brought an action of covenant against Hopkins for not conveying the military lands agreeable to covenant; to which Hopkins pleaded that Lee had never discharged the incumbrances on the estate of Hill and Dale. Said the court: "No lawyer can suppose that, let the judgment or decree on the bill in chancery have been either way, it could have been pleaded in bar to the last action of covenant brought by Lee against Hopkins. The *object* of the bill in chancery was to get refunded money, which the purchaser of an estate alleged that he had been obliged to expend, to free the estate from incumbrances which the seller was bound to remove. The object of the action at law was to recover damages for not conveying the military land, which were to be taken in part payment. Nothing could have been more distinct than the object of the two suits; they were not for the same matter, cause and thing, and let the issue of the bill in chancery have been as it might, the decree could not have been pleaded in bar of the action at law. But *by way of evidence,* the decree in chancery was held conclusive to prove that Lee had discharged the incumbrances on the estate, that being the matter directly adjudicated upon in the suit in chancery." And where a mortgagee brought ejectment to recover the mortgaged premises, and the mortgagor, on the trial, offered evidence to prove that the note which the mortgage was intended to secure was usurious and void; to which the mortgagee objected, on the ground that the mortgagor was estopped to show the alleged fact, by reason of a former judgment; the record of that judgment was produced, and it appeared from it that the mortgagee had sued the mortgagor on the note, that the latter had pleaded non-assumpsit therein with notice of the usury, and that a verdict and judgment were rendered for the mortgagor. It was conceded that the sole question litigated in the former suit was the same sought to be again controverted in the last. The judge thereupon sustained the objection, holding the first judgment *conclusive* in relation to the usury; and the Supreme Court afterward, on motion for a new trial, affirmed the decision. Betts v. Starr, *ante.* So, though nothing can certainly be more distinct than the object of an ejectment in England, and the action of trespass on the case for mesne profits, yet the judgment in ejectment is conclusive against the defendant *upon the right of possession,* at the time of the demise laid in the declaration.

jurisdiction directly upon a particular point is, as between the parties, conclusive in relation to such point, though the purpose and subject-matter of the two suits be different; and hence that a judgment may not only be *evidence* but *conclusive evidence,* and still be no bar to a second action.[5] A former suit is a bar only to such claims or matters as might have been litigated under the pleadings and issue as made.[6] It is not a bar as to matters which might have arisen incidentally or collaterally, such as a payment made on a demand.[7] Nor as to an allegation in the complaint in such former action, the truth of which was not involved in the judgment rendered.[8] Nor will a judgment by default on one of two notes, given upon an illegal contract, preclude the defendant from interposing his defense to an action on the second note.[9] Where an item is duly pleaded in a previous suit, the judgment is binding as to it, whether or not the party there introduced evidence to prove the item in question.[10] A judgment involving the right of a party to inherit land as heir, is conclusive in a subsequent proceeding involving his right to inherit personal property from the same person.[11] When a decree of dismissal of a bill in equity is unqualified with no words such as "without prejudice," the decree is conclusively presumed to have been upon the merits and is an official determination of the controversy. So, where in a suit involving the title to certain bonds a bill in equity to obtain the same bonds had been previously dismissed and the court there discusses both the title to the bonds and the question whether it had jurisdiction in equity and it does not appear on which ground the court dismissed the bill, it will be presumed that it was dismissed on the merits where both the merits and the question of jurisdiction were found adversely to the plaintiff in the opinion.[12] But where the principal question, upon which the plaintiff's right

[5] Betts v. Starr, 5 Conn. 550; Wright v. Deklyne, 1 Pet. (U. S. C. C.) 198; Starkie v. Woodward, 1 N. & M'Cord (S. C.), 329; Canaan v. Greenwoods Turnpike Co., 1 Conn. 1; Cist v. Zeigler, 16 S. & R. (Penn.) 282; Gardner v. Buckbee, 3 Cow. (N. Y.) 120; Wright v. Butler, 4 Wend. (N. Y.) 284.

[6] Burdick v. Post, 12 Barb. (N. Y.) 168; Bates v. Stanton, 1 Duer (N. Y.), 79.

[7] Smith v. Weeks, 26 Barb. (N. Y.) 463.

[8] Sweet v. Tuttle, 14 N. Y. 465.

[9] Hughes v. Alexander, 5 Duer (N. Y.), 488.

[10] O'Brien v. Manwaring, 79 Minn. 86. 71 N. W. 746, 79 Am. St. Rep. 426.

[11] Watson v. Richardson, 110 Iowa, 698, 80 N. W. 416, 80 Am. St. Rep. 331.

[12] Martin v. Evans, 85 Maryland, 8, 36 A. 258, 60 Am. St. Rep. 292.

to recover depends, has been determined in a former action, such former adjudication will be held conclusive in a new action on one of several securities springing out of the same transaction.[13] A judgment refusing payment of one installment of a certain assessment on the ground of its invalidity is conclusive of another proceeding to enforce another installment of the same assessment.[14]

To render a judgment a bar to an action it must appear plainly that the matter taken up in the second suit was decided in the first as if there is any doubt the matter is not *res judicata*. So where a demurrer to a complaint was sustained by a general order and the demurrer contained three grounds it is uncertain on what ground the demurrer was sustained and therefore the order is not binding as to any one particular ground.[15] Where a complaint does not claim damages for negligence but the two defendants in the action assert and claim negligence against each other the plaintiff in a later action is not bound by the adjudication of the court on the subject of negligence. A judgment is *res judicata* only as to the point actually litigated and determined in the original account and not as to what might have been litigated and determined.[16] So where a plaintiff applied for a writ of mandamus to compel the payment of his salary for certain months and a previous similar application for payment of his salary for other months had been decided in favor of the plaintiff, still that does not preclude the defendant from setting up the unconstitutionality of the statute under which the plaintiff claims his salary when it does not appear from the record that the question of constitutionality was set up in the first action although it might have been.[17] A judgment by default for services is no bar to an action by the defendant for damages caused by malpractice or other negligence of the judgment plaintiff.[18] The defendant in a judgment to foreclose a mortgage is not precluded from bringing a separate action to recover payments made during the pendency of the first action by

[13] Birkhead v. Brown, 5 Sandf. (N. Y.) 134.

[14] Markley v. People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234.

[15] Kleinschmidt v. Binzel, 14 Mont. 31, 37 P. 5, 43 Am. St. Rep. 604. See, also, Courtney v. William Knabe & Co. Mfg. Co., 97 Md. 499, 55 A. 614.

[16] Pitts v. Oliver, 13 S. D. 561, 83 N. W. 591, 79 Am. St. Rep. 907.

[17] Freeman v. Barnum, 131 Cal. 386, 63 P. 691, 82 Am. St. Rep. 355.

[18] Jordahl v. Berry, 72 Minn. 119, 75 N. W. 10, 71 Am. St. Rep. 469, discussing the conflict of authority on this question and dissenting from the New York doctrine as set forth in Blair v. Bartlett, 75 N. Y. 150, 31 Am. Rep. 455.

the fact that these payments might have been set up as a bar to recovery.[19] But a release claimed to be given after the beginning of an action but three years before judgment was rendered therein which was never put forth and pleaded in that action, is not admissible as a defense in a suit on a bond to dissolve an attachment made in the original action, as on the question of the release the original judgment is conclusive.[20] As between the parties and privies a judgment is conclusive as to every question upon which the right of the plaintiff to recover, or the validity of a defense in another suit is found to depend, and upon the determination of which it appears from the record or is shown by extrinsic proof that the judgment was in reality founded. If a defense be interposed and prevail, the fact or facts on which it is based become *res adjudicata;* thus a defense of usury established renders the usurious security void for any future use or purpose.[21]

Sec. 232. Effect of Foreign Judgments.

In England, the rule seems to be that, when a foreign judgment is made the foundation of an action, it is conclusive as to

[19] Maddux v. County Bank, 129 Cal. 665, 62 P. 264, 79 Am. St. Rep. 143.

[20] Tucker v. Carr, 20 R. I. 477, 40 A. 1, 78 Am. St. Rep. 893.

[21] Central City Bank v. Dana, 32 Barb. (N. Y.) 296.

The rule as to the conclusiveness of judgments has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments in the same courts, or to decisions of courts of concurrent jurisdiction. Hopkins v. Lee, 6 Wheat. (U. S.) 109, 114. It has been applied to decrees of the orphan's court of Pennsylvania, President of the Orphan's Court v. Goff, 14 S. & R. (Penn.) 181; M'Pherson v. Cunliff, 11 id. 422, to a discharge under the insolvent laws; M'Kinney v. Crawford, 8 S. & R. (Penn.) 351; Sheets v. Hawk, 14 id. 173; to a decision of the court of probates, though admitted to be erroneous; Brown v. Lanman, 1 Conn. 467; Jackson v. Robinson, 4 Wend. (N. Y.) 436; to a decree of the county court upon a complaint pursuant to the statute by which decree it was found the duty of a town to repair certain bridges; Canaan v. Greenwoods T. Co., 1 Conn. 1; to a decision of a court of common pleas, upon a complaint made pursuant to the statute, for overflowing lands; Adams v. Pearson, 7 Pick. (Mass.) 341; Gay v. Welles, id. 217; to a decree of the county court, awarding money to a claimant, arising from the sale of lands by the sheriff, though the decree was made upon a mistaken notion of law, and though the case admitted of no remedy by writ of error; Gratz v. The Lancaster Bank, 17 S. & R. (Penn.) 278; to record of the forfeiture of a recognizance, where debt was brought upon such recognizance; Shriver v. Commonwealth, 2 Rawle (Penn.), 206; to decrees of a court of equity; to sentences of courts of admiralty and of ecclesiastical tribunals, and in short to every court which has proper cognizance of the subject-matter, so far as they profess to decide the particular matter in dispute. Hopkins v. Lee, 6 Wheat. (U. S.) 109.

the merits,[1] but when it comes incidentally in question that it is only *prima facie* evidence.[2] But in our courts directly the reverse of this rule generally obtains, and a foreign judgment, when made the foundation of an action, is no more than *prima facial* evidence, and it may be impeached by showing that it was irregularly obtained, or, indeed, upon almost any ground which would have been a defense to the original suit.[3] In some cases it has been held that if the defendant produces proof which is sufficient to raise a presumption that the plaintiff's original claim was groundless, the latter will be put to prove his claim *de novo* the same as though no judgment had been rendered.[4] But the better opinion seems to be, that if the foreign court had jurisdiction of the subject-matter of the action and the parties, as if the defendant was personally served with notice of the suit in a legal manner, the judgment will be conclusive, and especially is this the case where the defendant appeared and answered the suit.[5]

And all the American cases agree, that where a foreign judgment comes incidentally in question, it is conclusive.[6] As where

[1] Gold v. Canham, 2 Swanst. 325; Tarleton v. Tarlton, 4 M. & S. 21; Phillips v. Hunter, 2 H. Bl. 410; Herbert v. Cook, Wils. 36 *n*.

[2] Houlditch v. Donegal, 2 Cl. & F. 478.

[3] Barney v. Patterson, 6 H. & J. (Md.) 182; Hoxie v. Wright, 2 Vt. 267; Benton v. Burgot, 10 S. & R. (Penn.) 240; Smith v. Lewis, 3 Johns. (N. Y.) 157; Robinson v. Prescott, 4 N. H. 450; Hall v. Williams, 6 Pick. (Mass.) 232; Gulick v. Loders, 2 N. J. Eq. 68; Winchester v. Evans, Cooke (Tenn.), 420.

[4] King v. Gilder, 1 D. Chip. (Vt.) 59.

[5] Taylor v. Bryden, 8 Johns. (N. Y.) 173; Cincinnati, &c., R. R. Co. v. Wynne, 16 Ind. 385; Sandford v. Sandford, 28 Conn. 6.

In Ohio, an action was brought on a justice's judgment of a neighboring State, and COLLET, J., delivering the opinion, said: "This judgment, although not within the act of Congress, is within the provision of the constitution. It is a judicial proceeding, to which full faith and credit is to be given. A State or nation is bound, and has the exclusive right to administer justice within its territories to parties there contending. When the parties have had an opportunity of being heard, and a definite decree has been pronounced, a regard to this right and duty of every State and nation, and to justice, requires that the justice of the sentence should not be re-examined by the tribunals of another State or nation, unless it is shown that the sentence was obtained by fraud. Vat. b. 2, c. 7, § 84. The courts in England had not uniformly regarded this principle of the law of nations, therefore it was, it is probable, that this was introduced into our constitution." Silver Lake Bank v. Harding, 5 Hamm. (Ohio) 545. It is further said, that whether the court rendering the judgment is a court of record or not, if it had jurisdiction, its decision is conclusive, and, until it is reversed, the parties cannot again litigate the same matter, unless there was fraud in obtaining it. See, also, Poorman v. Crane, 1 Wright (Ohio), 347; Goodrich v. Jenkins, id. 348; Silver Lake Bank v. Harding, id. 430; Kuhn v. Miller, id. 127.

[6] Barney v. Patterson's Lessee, 6

it is used as the foundation of a title derived under it;[7] or to show that the subject-matter of the action has once passed *in rem judicatem*;[8] or introduced by a guarantor, as a defense, in order to show that his principal was not liable,[9] or is relied upon by the garnishee in a foreign attachment, for the purpose of protecting himself against the claims of his original creditors;[10] or by the underwriter, in a policy of insurance, to show a breach of warranty on the part of the insured, in an action upon the policy;[11] or by a party to justify himself for acts done in virtue of it;[12] but all the cases agree that a judgment rendered without jurisdiction is void, and to be treated as a nullity, whether it comes in question directly or collaterally.[13]

A judgment of the supreme court or a circuit court of the United States, when offered in evidence in a State court, is not to be treated in regard to its effect as a foreign, but as a domestic judgment.[14]

By the constitution of the United States, it is declared that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." And congress is authorized by general laws to prescribe the manner in which such acts, records and proceedings shall be proved, and the *effect thereof*. In pursuance of this authority, congress, after providing for the mode of proof, has declared that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within

H. & J. (Md.) 182, 202, 203; Smith v. Lewis, 3 Johns. (N. Y.) 168, 169; James v. Allen, 1 Dall. (Penn.), 188; Andrews v. Herriot, 4 Cow. (N. Y.) 520, 521.

[7] Barney v. Patterson's Lessee, 6 H. & J. (Md.) 182, 202, 203; Thompson v. Tolmie, 2 Pet. (U. S.) 157.

[8] Smith v. Lewis, 3 Johns. (N. Y.) 157.

[9] Griswold v. Pitcairn, 2 Conn. 85.

[10] Taylor v. Phelps, 1 H. & G. (Md.) 492; see, also, Holmes v. Remsen, 4 Johns. Ch. 460; S. C., 20 Johns. 229; Bissell v. Briggs, 9 Mass. 462; Flower v. Parker, 3 Mass. (U. S.) 247; Perkins v. Parker, 1 Mass. 117; note to Andrews v. Herriot, 4 Cow. (N. Y.) 521; Scott v. Coleman, 5 Litt. (Ky.) 349, 350; Moore v. Spackman, 12 S. & R. (Penn.) 287.

[11] Croudson v. Leonard, 4 Cranch (U. S.), 434.

[12] Bissell v. Briggs, 9 Mass. 462; Rapelje v. Emery, 2 Dall. (Penn.) 231; Hoxie v. Wright, 2 Vt. 269.

[13] Elliot v. Piersoll, 1 Pet. (U. S.) 328; Fisher v. Harnden, 1 Paine (U. S.), 55; Holmes v. Boughton, 10 Wend. (N. Y.) 75; Walker v. Maxwell, 1 Mass. 103; Collett v. Keith, 2 East, 261; Thompson v. Tolmie, 2 id. 157.

[14] See Barney v. Patterson, 6 H. & J. (Md.) 182, 203; St. Albans v. Bush, 4 Vt. 58; Pepoon v. Jenkins, 2 Johns. Cas. (N. Y.) 119; Reed v. Ross, 1 Baldw. (U. S. C. C.) 36.

the United States as they have by law or usage in the court of the State from whence the said records are or shall be taken." By a supplementary statute, the provisions of the original act are extended to the records and judicial proceedings of the respective territories of the United States, and the countries subject to the jurisdiction of the United States.

There has been some diversity of opinion with respect to the interpretation of this clause of the constitution, particularly as to the words in the latter branch of the section, "and the effect thereof." Some judges have thought that the word "thereof" has reference to the proof or authentication, so as to read "and to prescribe the effect of such proof or authentication." Others have thought that it referred to the antecedent words, "acts, records and proceedings," so as to read "and to prescribe the effect of such acts, records and proceedings."[15] Those who were of opinion that the preceding section of the clause made judgments in one State conclusive in all others, naturally adopted the former opinion; for otherwise, the power to declare the effect would be either wholly senseless or congress would possess the power to repeal or vary the full faith and credit given by that section. Those who were of opinion that such judgments were not conclusive, but only *prima facie* evidence, as naturally embraced the other opinion, and supposed that until congress should by law declare what the effect of such judgment should be, they remained only *prima facie* evidence.[16]

The former seems the interpretation generally adopted; but it is not practically of much importance which construction prevails, since each admits of the competency of congress to declare the effect of judgments when duly authenticated, which has been done. It may be stated, as a principle now uniformly received and sanctioned throughout the United States, that the judgment of one of the State courts is of the same dignity in every other State as in the one where it was pronounced; and hence, if in the courts of the State where the judgment was pronounced, it is conclusive in its operation as evidence, or otherwise, it must be equally so and to the same extent in all the courts throughout the Union.[17]

[15] Bissell v. Briggs, 9 Mass. 462, 467; Winchester v. Evans, Cooke (Tenn.), 420; Hitchcock v. Aicken, 1 Cai. (N. Y.) 460; Green v. Sarmiento, 1 Pet. (U. S. C. C.) 74; Field v. Gibbs, id. 155; Commonwealth v. Green, 17 Mass. 515.

[16] 3 Story's Const. 181.

[17] Mills v. Duryee, 7 Cranch (U. S.), 481; Clark v. Carrington, 7 id.

All the cases above cited will be found to agree that the judgment of a neighboring State may be wholly impeached by showing that the court rendering it had not jurisdiction; and it makes no difference whether the judgment comes in question directly or incidentally.[18] And if the judgment is inconclusive in the State where it was rendered, or if it is inquirable into there during a particular period and on certain conditions, it will be open to investigation to the same extent everywhere else. This is an obvious deduction from the foregoing position with regard to the effect of such judgments generally. It is, moreover, directly sanctioned by several well-considered cases.[19]

Some of the authorities have a vague way of impeaching such judgments by showing that they were fraudulently obtained.[20] Possibly this may mean fraud in acquiring jurisdiction; as where jurisdiction has professedly been obtained against a non-resident by attaching his property, and the property attached was merely nominal, as a chip or the like, or did not belong to the defendant.

308; Hampton v. M'Connell, 3 Wheat. (U. S.) 234; Mayhew v. Thatcher, 6 id. 129; Hoxie v. Wright, 2 Vt. 263; Buford v. Buford, 4 Munf. (Va.) 241; Borden v. Fitch, 15 Johns. (N. Y.) 121; Andrews v. Montgomery, 19 id. 162; Field v. Gibbs, 1 Pet. (U. S. C. C.) 155; Commonwealth v. Green, 14 Mass. 515; Gibbons v. Livingston, 6 N. J. L. 236; Newell v. Newton, 10 Pick. (Mass.) 470; Hall v. Williams, 6 id. 232; Spencer v. Brockway, 1 Ham. (Ohio), 259; Benton v. Burgot, 10 S. & R. (Penn.) 240; Mitchell v. Osgood, 4 Me. 124; Wheeler v. Raymond, 8 Cow. (N. Y.) 311; Shunway v. Stilwell, 6 Wend. (N. Y.) 447; Starbuck v. Murray, 5 id. 148; Holbrook v. Murray, 5 id. 161; Rogers v. Coleman, Hard. (Ky.) 413; Scott v. Coleman, 5 Litt. (Ky.) 349; Evans v. Tatem, 9 S. & R. (Penn.) 259, 260; Kean v. Rice, 12 id. 203; Gilman v. Houseley, 5 Martin's La. Rep., N. S. 661; Mackee v. Cairnes, 2 id. 599; Clark v. Day, 2 Leigh (Va.), 172; Hayman v. Miller, 1 Bailey (S. C.), 242; Holt v. Alloway, 2 Blackf. (Ind.) 108; Gulick v. Loder, 1 Green, 68; Earthman v. Jones, 2 Yerg. (Tenn.) 484. See, also, Jacobs v. Hull, 12 Mass. 25; Wade v. Wade, Cam. & Norw. 486; Betts v. Death, Addis. (Penn.) 265; Curtis v. Gibbs, 1 Penn. 399; Smith v. Rhoades, 1 Day (Conn.), 168; Wernwag v. Pawling, 5 G. & J. (Md.) 500; Bradshaw v. Heath, 13 Wend. (N. Y.) 407; McRae v. Mattoon, 13 Pick. (Mass.) 53; Tipton v. Maryfield, 10 La. 189; Hinton v. Townes, 1 Hill (N. Y.), 439; Adams v. Rowe, 14 Me. 89; Goodrich v. Jenkins, 1 Wright (Ohio), 348; Hunt v. Lyle, 8 Yerg. (Tenn.) 142, 6 id. 412.

[18] See Elliot v. Piersol, 1 Pet. (U. S.) 328, 340; Thompson v. Tolmie, 2 id. 157; Holmes v. Boughton, 10 Wend. (N. Y.) 75; Bradshaw v. Heath, 13 id. 407; Walker v. Maxwell, 1 Mass. 103; Fisher v. Harnden, 1 Paine (U. S. C. C.), 55.

[19] Green v. Sarmiento, 1 Pet. (U. S. C. C.) 74; Baugh v. Baugh, 4 Bibb (Ky.), 556; Curtis v. Gibbs, N. J. Eq. 399; Rogers v. Coleman, 1 Hardin (Ky.), 420; Armstrong v. Carson, 2 Dall. (Penn.) 302; 1 Story's Com. on the Const. 183; Wernwag v. Pawling, 5 H. & J. (Md.) 500.

[20] See Andrews v. Montgomery, 19 Johns. (N. Y.) 162; Borden v. Fitch, 15 id. 121; Holt v. Alloway, 2 Blackf. (Ind.) 108; Silver Lake Bank v. Harding, 5 Ham. (Ohio) 545.

In such case the judgment might be void, even by the local law;[21] or it may relate to instances where jurisdiction has been exercised in fraud of the sovereignty which had the rightful and exclusive jurisdiction.[22] It is clear that wherever the point has been started, courts, in examining these judgments, have generally felt themselves restricted to inquiries respecting the effect to which they would be entitled in a collateral suit in the State where they were pronounced.[23] In Massachusetts, it has been directly determined that in an action on the judgment upon another estate, the defendant cannot be allowed to show that it was obtained by fraud and misrepresentation.[24] Upon foreign judgments the merits as well as the jurisdiction of the courts which rendered them may be inquired into, so where a foreign judgment appears from the pleadings to be founded on a certain assignment which has been declared invalid by the court of the forum the judgment itself will be held invalid in that court.[25] Where it appears on inspection of the papers that the court did not acquire jurisdiction, as on account of insufficient service, the judgment is void beyond the jurisdiction in which it was pronounced,[26] and where a default is obtained against a party in a suit in a foreign court by collusion with the plaintiff in that suit to defeat the title of a third party the latter may plead the collusion in avoidance of the judgment.[27] Where a judgment of a court of another State is set up as a bar to an action it is open to the plaintiff to show that the foreign judgment was obtained through fraud in procuring certain attorneys to appear in the action.[28] The judgment of another State rendered by the entry of a prothonotary under a peculiar practice in that State will be

[21] Beech v. Abbott, 6 Vt. 592; Rogers v. Coleman, Hardin (Ky.), 418.

[22] Borden v. Fitch, 15 Johns. (N. Y.) 121; Jackson v. Jackson, 1 id. 424; Harding v. Alden, 9 Me. 140.

[23] In Moren v. Killibrew, 2 Yerg. (Tenn.) 379, WHYTE, J., delivering the opinion in a case which involved the extent to which such inquiry might go, said: "I disclaim all power over that court or its proceedings, whether it hath rendered a correct, a regular or an erroneous judgment upon the subject-matter before it. This court confines itself within that narrow limit of inquiry, incidental, from necessity, to all courts which are called on to enforce and carry into effect the judgment of some other court. That limit is an inquiry into the jurisdiction of the court rendering the judgment."

[24] McRea v. Mattoon, 13 Pick. (Mass.) 53; Smith v. Lewis, 3 Johns. (N. Y.) 517.

[25] Tremblay v. Aetna Life Insurance Co., 97 Maine, 547, 55 Atl. 509, 94 Am. St. Rep. 521, and note, page 532.

[26] Id.

[27] Id.

[28] Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720.

recognized in other States if valid where made, although it would not have been valid if so rendered in the State of the forum.[29] A foreign judgment against the defendant entered without service on or appearance of the defendant, is valid if taken in accordance with an agreement to confess judgment previously signed by him.[30] Some discussion has arisen as to what kind of judgments were included within the constitution and the law of congress.[31]

[29] Fred Miller Brewing Co. v. Capital Insurance Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529.

[30] Crim v. Crim, 162 Mo. 544, 63 S. W. 482, 85 Am. St. Rep. 521.

[31] In Massachusetts, it had been settled that they embraced only civil judgments, and did not extend to judgments in criminal proceedings. Hence, a conviction of an individual in New York of an infamous offense was held, in the former State, not to disqualify him from being a witness; Commonwealth v. Green, 17 Mass. 515; but in North Carolina a different doctrine is maintained. There it has been held that a judgment of conviction in a neighboring State of an infamous crime is within the constitution and act of Congress, and renders the person convicted incompetent. State v. Candler, 3 Hawks (N. C.), 393.

In New Hampshire, it is held that a judgment of a justice of the peace of another State cannot be authenticated according to the law of Congress; and it is, therefore, regarded as standing upon the same footing with a foreign judgment, leaving the whole merits open for reinvestigation. Robinson v. Prescott, 4 N. H. 450; Mahurin v. Bickford, 6 id. 567.

In Massachusetts, the courts are not disposed to extend the constitution and law of Congress any further than the decisions of the Federal court necessarily require, and have accordingly held with New Hampshire in respect to the judgments of justices of the peace. Their language on this subject is as follows: "Certainly we think the judicial proceedings referred to in the constitution were supposed, by the Congress which passed the act providing the manner of authenticating records, to have related to proceedings of courts of general jurisdiction, and not those which are merely of municipal authority; for it is required that the copy of the record shall be certified by the clerk of the court, and that there shall be also the certificate of the judge, chief justice or the presiding magistrate, that the attestation is in due form. This is founded upon the supposition that the court, whose proceedings are to be thus authenticated, is so constituted as to admit of such officers, and the act has wisely left the records of magistrates who may be vested with limited judicial authority, varying in its objects and extent in every State, to be governed by the laws of the State into which they may be introduced for the purpose of being carried into effect. Being left unprovided for by the constitution or laws of the United States, they stand upon no better footing than foreign judgments, being not more than *prima facie* evidence of debt, and liable to be defeated in their operation, under the plea of *nil debet*, as other foreign judgments are." Warren v. Flagg, 2 Pick. (Mass.) 449. Whether this is the law in Indiana, *quere*. See Cone v. Cotton, 2 Blackf. (Ind.) 82. In Connecticut, a justice's judgment rendered in "those States where justices of the peace hold courts of record," has been held within the act of Congress, and not re-examinable when properly authenticated. Bissell v. Edwards, 5 Day (Conn.), 363. In Vermont the same doctrine prevailed formerly as in New Hampshire and Massachusetts, viz., that the justices' judgments of neighboring States generally, were not contemplated by the act of Congress and the constitution, and consequently were re-examinable upon the merits when sued upon like foreign judgments. King v. Van Gilder, 1 D. Chip. (Vt.) 59. But more

Sec. 233. Attack on Foreign Judgments.

A foreign judgment may always be avoided upon any ground upon which a domestic judgment could be avoided, and where upon its face it does not appear to be final and conclusive as an estoppel in the country in which it was rendered it will not be an estoppel in a foreign jurisdiction.[1] So a foreign judgment may be impeached upon an error of law apparent upon its face, whether it was set up as a ground of action, or in defense thereto.[2] But the error of the law must be very clear.[3] So, too, they may be avoided if founded upon fraud, or rendered by a court which did not have jurisdiction,[4] or if the defendant was not served with process in the original action.[5] The proposition that a judgment pronounced without jurisdiction is void, and can be no evidence

recently it has been held otherwise in regard to the judgment of a justice, "where the law requires him to keep records." Starkweather v. Loomis, 2 Vt. 573; Blodget v. Jordan, 6 id. 580. In Kentucky, it seems that a judgment of an Indiana justice of the peace is within the constitution and the act of Congress. Scott v. Cleveland, 3 Mon. (Ky.) 87.

In Ohio, the doctrine is, that the mode of certifying the judgments of justices of the peace has not been provided for by the act of Congress; but when duly proved in the common-law mode they are within the provisions of the constitution, entitled to "full faith and credit," and not subject to re-examination. Silver Lake Bank v. Harding, 5 Ham. (Ohio), 545; Kuhn v. Miller, id. 127. So also, it seems, in New York. Thomas v. Robinson, 3 Wend. (N. Y.) 263; Sheldon v. Hopkins, 7 id. 435; Stockwell v. Coleman, 10 Ohio St. 33. A decree of the court of chancery has been held within the constitution and act of Congress. Barbour v. Watts, 1 Marsh. (Ky.) 292, 293; Tarlton v. Briscoe, 1 id. 67. So also, in Louisiana, Scott v. Blanchard, 8 Mart (La.) 303. In Tennessee, Hunt v. Lyle, 8 Yerg. (Tenn.) 142, 6 id. 412. In South Carolina, Miller v. Miller, 1 Bailey (S. C.), 242. In New York, a regular decree of *divorce*, by the Superior Court of Connecticut, has been viewed as standing upon the same footing. Bradshaw v. Heath, 13 Wend. (N. Y.) 407. In Maine, Harding v. Alden, 9 Me. 149.

[1] Plummer v. Woodburne, 4 B. & C. 636; Smith v. Nicholls, 5 New Cases, 222; Obiohui v. Bligh, 8 Bing. 351.

[2] Mouelli v. Rossi, 2 B. & Ad. 757; Buchanan v. Rucker, 1 Camp. 67.

[3] Alivan v. Furnival, 1 C. M. & R. 293; Arnot v. Redfern, 2 C. & P. 88; Becquet v. McCarthy, 2 B. & Ad 957.

[4] Price v. Deerhurst, 8 Sim. 279.

[5] Buchanan v. Rucker, 1 Camp. 67; Mees v. Thulluson, 20 Eng. L. & Eq. 465; Frankland v. MacGusty, 1 Knapp, 274; Ferguson v. Mahon, 11 Ad. & El. 179; Houlditch v. Donegal, 8 Bligh, 338; and the defendant may show that he was not served, Redus v. Burnett, 59 Tex. 376; Lampton's Succession, 35 La. An. 418; Mitchell v. Ferriss, 5 Del. 34.

Thus, where the summons in the case was served by nailing it up on the door of the courthouse, it was held that although this might have been a legal service in the jurisdiction in which the judgment was rendered, it was not sufficient to give validity to the judgment outside that jurisdiction. A contrary doctrine would not only be inconsistent with every principle of justice, but would be exceedingly dangerous. In a case before cited, Buchanan v. Rucker, *ante*, it was attempted to maintain

whatever, is universally acknowledged, not only in respect to foreign judgments, but to judgments as among the neighboring States, as well as to domestic judgments. And it makes no difference whether the judgment is sought to be enforced directly by action, or whether it comes incidentally in question. The application of this doctrine to foreign judgments, and to judgments in the several States will be found recognized in nearly all the cases. So far as the general principle is concerned, there is no difficulty; but the point of embarrassment usually lies in determining whether the court had jurisdiction in fact, and in ascertaining how far that jurisdiction extended in the particular instance. This will lead to the inquiry, among others, *was the court properly constituted?* Such inquiry is always allowable when a foreign judgment, or the judgment of a neighboring State comes in question;[6] but to what length is not very clearly defined. In a Pennsylvania case[7] an objection was raised as to the jurisdiction of a court, acting at St. Domingo, which was said not to have been derived from the proper authority; and it was held sufficient that the court was one *de facto,* deriving its authority from those in whom the power of the country was for the time being vested; and, therefore, it was held to have the jurisdiction of a legitimate court.[8] If the origin of the foreign court does not appear, it seems that it will be presumed legitimate; but where the source of its authority is stated, the tribunal before which its judgment is produced will examine it; and if it be contrary to the usual mode of constituting courts, it shifts the *onus probandi* upon the party who would sustain the judgment, and it will then be for him to establish that the foreign court was properly organized.[9] Another im-

the judgment by the local law of the island of Tobago, where it was rendered, which, in terms, authorized proceedings of a similar nature against persons *absent from the island.* Lord ELLENBOROUGH, who delivered the opinion, 9 East, 192, said: "*Absent from the island* must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the court out of which the process issued; and as nothing of that sort was in proof here to show that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit upon the judgment so obtained."

[6] Rose v. Himely, 4 Cranch (U. S.), 241; Cherriot v. Foussat, 3 Binn. (Penn.) 220; Moren v. Killibrew, 2 Yerg. (Tenn.) 376, 379, 380; The Nueva Anna and Liebre, 6 Wheat. (U. S.) 193.

[7] Bank of North America v. McCal, 4 Binn. (Penn.) 371.

[8] Ingram v. Cocke, 1 Overt. (Tenn.) 22. See *per* BEST, C. J., Yrisarri v. Clement, 2 C. & P. 223.

[9] Snell v. Faussatt, 1 Wash. (U. S. C. C.) 271.

portant inquiry is, *has the foreign court, or the court of the neighboring State, as the case may be, complied with the local law, so as to have enabled it to acquire jurisdiction over what it has assumed to decide?* That this inquiry is admissible, results necessarily from the legal truism, that a judgment void where it is rendered is void everywhere. It has indeed been said, in a general way, in reference to admiralty proceedings, that a foreign court, so far as its jurisdiction depends upon municipal rules, must judge whether it has jurisdiction or not, and that such decision must be respected.[10] But if, by our obligation to *respect* decisions of this character, it is intended to affirm that we are to regard them as conclusive, the doctrine carried out and applied to foreign courts deriving their jurisdiction under local regulations, would obviously lead to an absurdity not to be countenanced: for every court either expressly or by implication passes upon the question of its own jurisdiction whenever it renders judgment; and to say that because it has so passed upon it, there shall be no further examination into the point, would be paying to foreign judgments a more deferential regard than is allowed even to domestic judgments.[11] The court held a Missouri judgment, rendered upon attachment, void, because, among other things, the return of the officer to the attachment did not comply with the local statute.[12] A foreign judgment is conclusive, so far as to preclude a retrial upon the merits.[13] But the defendant may show that the foreign court had not jurisdiction of the subject-matter of the suit, or that the defendant was not served with process, or that the judgment was fraudulently obtained.[14] It may also be shown that the judgment was afterward reversed or vacated by the court rendering it, even where that was done after issue joined upon it in this State.[15] A question not unfrequently arises under this branch of

[10] Rose v. Himely, 4 Cranch (U. S.) 276; Cherriot v. Foussat, 3 Binn. (Penn.) 255.

[11] Earthman v. Jones, 4 Yerg. (Tenn.) 484.

[12] Earthman v. Jones, 4 Yerg. (Tenn.) 484. See, also, Cone v. Cotton, 2 Blackf. (Ind.) 82; Buchanan v. Rucker, 9 East, 192; Moren v. Killibrew, 2 Yerg. (Tenn.) 376; Elliot v. Piersol, 1 Pet. (U. S.) 340, 341; Thompson v. Tolmie, 2 Pet. (U. S.) 157; Fisher v. Harnden, 1 Paine (U. S.), 155.

[13] Lozier v. Westcott, 26 N. Y. 146.

[14] Henderson v. Henderson, 6 C. B. 288; Ferguson v. Mahen, 11 Ad. & El. 179.

[15] Kinsey v. Ford, 38 Barb. (N. Y.) 195. In Jarvis v. Sewell, 40 Barb. (N. Y.) 449, the mode of proving a judgment or decree of the privy council in England, which is not a court of record, and has neither clerk nor

the inquiry: What is the presumption where a foreign judgment, or the judgment of a neighboring State, is introduced, respecting its jurisdiction, as depending upon its compliance or non-compliance with the local law?[15a] A distinction is taken between judgments of courts of *limited and special jurisdiction,* and those of

seal, is considered and passed upon, in an action upon a bond for costs given on appeal from a Canada judgment.

[15a] In an English case, Umbragio v. Bligh, 8 Bing. 335, a suit was instituted in England to recover damages awarded by the vice-admiralty of the island of Malta; and it was held that the decree, in order to be evidence of indebtedness, must show expressly, and not by mere inference, that the defendant was brought within the jurisdiction of the vice-admiralty court, and that the court where the suit was pending would not presume it. So also, in a New Hampshire case, Thurber v. Blackburn, 1 N. H. 242, where debt was brought, in New Hampshire, upon a judgment of the common pleas of Rhode Island, it was held, that inasmuch as it did not appear by the record that the defendant had personal notice of the suit, or appeared to the action in the court where the judgment was pronounced, the judgment must be regarded as obtained without jurisdiction; for these facts would not be presumed. In a New York case, Bradshaw v. Heath, 13 Wend. (N. Y.) 407, the plaintiff, Mary Bradshaw, brought ejectment, in New York, for dower, and in answer to proof on the part of the defendant, that the plaintiff previous to the marriage in virtue of which she claimed dower, was a married woman; and that her first husband was still alive—the plaintiff produced a record of the Superior Court of Connecticut, containing a sentence of divorce, on her petition, from her first husband. The petition, as stated in the record, alleged that the first husband had deserted the petitioner, and had ever since been to parts unknown. No appearance on the part of the husband was shown by the record, no. did it state that he was served with process, or had notice of the proceeding; but, on the contrary, the adjudication was alleged to have been made on hearing "the plea and evidence produced by the plaintiff." The defendant proved that the first husband, at the time of the presentation of the petition, and of the granting of the divorce, was an inhabitant of the State of New York; and the court held, that although the record of a court of competent jurisdiction of another State, granting a divorce, is conclusive, and entitled to full faith and credit, yet it is so, only as to matters clearly and distinctly stated in it, and not as to those which are merely inferable by argument from the judgment; that in the particular case, the record of divorce was no evidence of the jurisdiction of the court over the person of the defendant in those proceedings, because no fact was stated giving jurisdiction; and if jurisdiction was inferable at all, it was only so by argument from the judgment; and consequently that the presumption, under the circumstances, was against the validity of the decree. Harding v. Alden, 9 Me. 140; Harrison v. Harrison, 19 Ala. 499; Hull v. Hull, 2 Strobh. Eq. (S. C.) 174. In a Kentucky case, Scott v. Coleman, 5 Litt. (Ky.) 350, the rule on this subject with regard to the ordinary judgments of neighboring States, is laid down as follows: "That when the judgment or decree of a sister State is produced, rendered by one of its tribunals, we must presume *that* tribunal had jurisdiction and authority," and the *onus* of impeaching it is thus thrown on him against whom it is urged. The presumption as to jurisdiction may be overcome by proof of extrinsic matters which show that the court did not in fact have jurisdiction. O'Rourke v. Chicago, &c., R. R. Co., 55 Iowa, 332.

general jurisdiction. But what is a court of limited and special jurisdiction, as contradistinguished from a court of general jurisdiction, and in what way is the tribunal before which a judgment of a foreign court is produced to determine whether such court belongs to the one or the other of these classes? These and other points suggest themselves, when the mind is brought to bear upon the subject, and without attempting anything like a solution of them, we shall content ourselves with using the terms mentioned as they are used in the books. In respect to courts of *general jurisdiction,* then the rule is, that they are presumed to have had jurisdiction until the contrary clearly appears.[16]

But in respect to courts of *limited and special jurisdiction,* the rule is different; nothing is presumed in their favor so far as it respects jurisdiction; and the party seeking to avail himself of their judgments, must show affirmatively that they had jurisdiction.[17]

[16] See Mills v. Martin, 19 Johns. (N. Y.) 33; Thomas v. Robinson, 3 Wend. (N. Y.) 267, 12 N. Y. 156.

This rule has been applied, in New York, to the judgments of *courts of common pleas* and *county courts* of neighboring States. Thus, in an early case, Shumway v. Stillman, 4 Cow. (N. Y.) 292, debt was brought on a common plea judgment of Massachusetts; the defendant plead that at the time of the commencement of the suit in which the judgment was obtained, and ever since, he had been, and still was, a resident in Schenectady, in the State of New York. To this there was a general demurrer, which the court sustained, on the ground that the defendant had not expressly negatived the idea that he appeared to the suit, and thus conferred jurisdiction. "Every presumption," says SUTHERLAND, J., "is in favor of the jurisdiction of the court. The record is *prima facie* evidence of it; and will be held conclusive, until clearly and explicitly disproved." Harrod v. Barretto, 1 Hall (N. Y.), 155. In Wheeler v. Raymond, 8 Cow. (N. Y.) 311, the court seem to have held similarly in respect to proceedings of a county court of Vermont, commenced under a statute of that State relating to foreign attachments. The same doctrine has been acted on in Connecticut. Smith v. Rhoades, 1 Day (Conn.), 168. See, also, Pringh v. Woolworth, 90 N. Y. 502.

[17] Mills v. Martin, 19 Johns. (N. Y.) 33; Peacock v. Bell, 1 Saund. 73; Kempe v. Kennedy, 5 Cranch (U. S.), 173, 1 Pet. (U. S. C. C.) 30; Wheeler v. Raymond, 8 Cow. (N. Y.) 311.

Accordingly, in New York, where an action was brought on a justice's judgment of a neighboring State, it was held that it could not be sustained until the statute creating and organizing the court was produced and proved, that it might be seen whether the justice had jurisdiction or not; for the courts of one State will not take judicial notice of the statutes of another. Thomas v. Robinson, 3 Wend. (N. Y.) 267; Sheldon v. Hopkins, 7 id. 435.

Now, by statute of New York, a transcript from the docket of a justice of an *adjoining* State is made presumptive evidence of the facts stated in such transcript, when authenticated in the mode prescribed in the act. The transcript, however, is liable to be controverted by evidence in all its parts relative to the validity of the judgment. In Indiana, it appeared that a *scire facias* had been

A still further inquiry may arise, when a foreign judgment, or the judgment of a neighboring State, is produced, viz.: *What measure of jurisdiction could the sovereign power of the place where the judgment was rendered, confer upon its courts?* Considered in an international point of view, jurisdiction, to be rightfully obtained, must be founded either upon the person of the defendant being within the territory of the sovereign where the court sits, or his property being within such territory; for otherwise, there can be no sovereignty exerted, upon the known maxim, *extra territorium jus dicenti impune non paretur.*[18] Even, therefore, should the legislature of a nation or of a neighboring State expressly grant jurisdiction to its courts over persons or property not within its territory, such grant would be treated elsewhere as a mere attempt at usurpation, and all judicial proceedings in virtue of it, held utterly void for every purpose.[19]

issued by a justice of the peace of Ohio, and on a return of the writ "not found," judgment passed for the plaintiff, upon which action was brought in the former State; and it was held, that the judgment having been rendered without service of the writ or the return of two *nihils*, would not, on common law principles support the action; and that if the judgment was authorized by a statute of Ohio on the return of "not found," such statute must be shown by the party setting up the judgment. Cone v. Cotton, 2 Blackf. (Ind.) 82. And in regard to this class of jurisdictions it is observable generally, that where a statute prescribes a new proceeding, either unknown to the common law or contrary thereto, the statute, so far, at least, as those parts of it essential to jurisdiction are concerned, must be not only proved, but shown to have been strictly pursued, or the proceeding will be held a nullity. Earthman v. Jones, 2 Yerg. (Tenn.) 493. The same has been said with regard to summary proceedings and extraordinary powers, exercised by any court under a special statute. Thatcher v. Powell, 5 Wheat. (U. S.) 119; Holmes v. Broughton, 10 Wend. (N. Y.) 75; Collet v. Keith, 2 East, 221; Walker v. Maxwell, 1 Mass. 103.

[18] Story's Confl. of Laws, 450; 3 Dig. Lib. 2, tit. 1, ch. 20; 1 Boullenois' Pr. Gen. 1, 2, pp. 2, 3; Vattel, b. 2, ch. 8, § 84.

[19] See Buchanan v. Rucker, *ante;* also, Picquet v. Swan, 5 Mas. (U. S.) 35; Story's Confl. of Laws, 450, 451; Kilburn v. Woodworth, 5 Johns. (N. Y.) 37; Robinson v. Ward, 8 id. 86; Borden v. Fitch, 15 id. 121; Hall v. Williams, 6 Pick. (Mass.) 232; Flower v. Parker, 3 Mas. (U. S.) 251; Bartlett v. Knight, 1 Mass. 401; Miller v. Miller, 1 Bailey (S. C.), 242; Earthman v. Jones, 2 Yerg. (Tenn.) 484; Moren v. Killibrew, id. 376; Rogers v. Coleman, Hardin (Ky.), 413; St. Albans v. Bush, 4 Vt. 58. Whether the doctrine applies to decrees of divorce obtained in one State strictly according to the local law, and sought to be used in another, *quere.* See Harding v. Alden, 9 Me. 140; Bradshaw v. Heath, 13 Wend. (N. Y.) 407. In Harding v. Alden, *ante*, the Supreme Court of Maine seemed to think that it did not, so far as the mere question of conjugal rights was concerned, they being the subject of a suit in the nature of a proceeding *in rem;* but otherwise, if the decree was sought to be enforced as to alimony.

A person, however, though a citizen of another State or country, when he comes within the territory of a particular sovereignty, contracts a sort of temporary allegiance to it, and may justly be subjected to its process, and bound personally by the judgment of its courts. And whether jurisdiction is founded upon the person being within the territory, or the *property* being there, the judgment will be deemed valid, so far as that jurisdiction could legitimately extend; but no farther. Thus, a very common course, in many of the United States, and in many other countries, is to proceed against non-residents by an arrest or attachment of their property within the territory. Judgment obtained upon process of this kind will generally bind the property so arrested or attached; for to that extent the court has or can have jurisdiction. But such judgment will not be regarded by neighboring States or other nations as evidence of indebtedness or as operative in any measure *in personam;* and for this very obvious reason, viz., that except so far as the property attached is concerned, there is and can be no jurisdiction, no power of adjudication.[20]

Where the summons is served upon a non-resident by publication, if the defendant has property in the State, the judgment is limited in its effect to such property in the State, where the judgment is obtained.[21] Without service of process the judgment is of no validity out of the State.[22]

So as to judgments or decrees in other cases, obtained against persons resident abroad without notice to them, and an opportunity afforded of defending.[23] And in order that the judgment

[20] Picquet v. Swan, *ante;* Story's Confl. of Laws, 461; Kilburn v. Woodworth, 5 Johns. (N. Y.) 37; Pawling v. Bird, 13 id. 192; Sargeant on Attachments, 112, 113, 114, *et seq.;* M'Clenachan v. M'Carty, 1 Dall. (Penn.) 375; Phelps v. Holker, id. 264; Robinson v. Ward, 8 Johns. (N. Y.) 86; Borden v. Fitch, 15 id. 121; Hall v. Williams, 6 Pick. (Mass.) 232; Betts v. Death, Addis. (Penn.) 265; Fenton v. Garlick, 8 Johns. (N. Y.) 194, 197; Flower v. Parker, 3 Mas. (U. S.) 251; Wilson v. Graham, 4 Wash. (U. S. C. C.) 53, 57; Bissell v. Briggs, 9 Mass. 462; Kibbe v. Kibbe, Kirby (Conn.), 119; Dennison v. Hyde, 6 Conn. 508; Aldrich v. Kinney, 4 id. 380, 387; Earthman v. Jones, 2 Yerg. (Tenn.) 484; Hoxie v. Wright, 2 Vt. 263; Rogers v. Coleman, Hardin (Ky.), 413; Newton v. Newell, 10 Pick. (Mass.) 470; Starbuck v. Murray, 5 Wend. (N. Y.) 148; Holbrook v. Murray, id. 161; Bradshaw v. Heath, id. 407; Bates v. Delavan, 5 Paige (N. Y.), 299, 305; Armstrong v. Harshaw, 1 Dev. (N. C.) 188.

[21] Force v. Gower, 23 How. Pr. (N. Y.) 294.

[22] Oakley v. Aspinwall, 4 N. Y. 521.

[23] Bellows v. Ingham, 2 Vt. 576, 577; Woodward v. Tremere, 6 Pick. (Mass.) 354; Newell v. Newton, 10 id. 472; Bartlet v. Knight, 1 Mass. 401; Cone v. Cotton, 2 Blackf. (Ind.) 82; Moren v. Killibrew, 2 Yerg.

under these circumstances may be rendered binding upon the defendant *in personam*, the notice must be *personally served* upon him. This will be found sustained by all the cases; and where notice was given by publication in the newspapers, as is frequently done in certain chancery proceedings in several of the States, to bring in some of the parties who were absent, it was held, that a decree, pursuant to notice of that character, as against such absent defendants, was no evidence of indebtedness.[24] The notice must, moreover, be served upon the defendant while he is within the jurisdiction of the sovereignty under which the court acts; for no sovereign has a just right to issue such notice to the citizen of another State or country, and thereby draw the party from his own proper forum *ad alium examen*.[25] But if the party, in any of these instances, chooses to appear and contest the merits, thereby waiving his personal immunity, and submitting to the jurisdiction of the court, the judgment would then doubtless bind him personally, and be entitled to the same measure of respect with the judgment of a neighboring State or a foreign country, as the case may be, obtained in the ordinary mode.[26] However, it has been held otherwise in cases of foreign attachments, where the defendant has merely appeared to protect his property.[27]

(Tenn.) 376; Thurber v. Blackbourne, 1 N. H. 242; Bradshaw v. Heath, 13 Wend. (N. Y.) 407; Hart v. Lodwick, 8 La. 164; Spencer v. Sloo, id. 290.

[24] Miller v. Miller, 1 Bailey (S. C.), 242. See Moren v. Killibrew, 2 Yerg. (Tenn.) 376; Cone v. Cotton, 2 Blackf. (Ind.) 82.

[25] Picquet v. Swan, *supra;* Dunn v. Dunn, 4 Paige, 425; Fenton v. Garlick, 8 Johns. 194, 197; Flower v. Parker, 3 Mas. (U. S.) 251; Wilson v. Graham, 4 Wash. (U. S. C. C.) 53; Woodward v. Tremere, 6 Pick. (Mass.) 354; Harrod v. Barretto, 1 Hall (N. Y.), 155; Kilburn v. Woodworth, 5 Johns. (N. Y.) 161; Arnold v. Toutelott, 13 Pick. (Mass.) 172; Adam v. Rowe, 11 Me. 98.

[26] Picquet v. Swan, 5 Mas. (U. S.) 43; Flower v. Parker, 3 id. 251; Hall v. Williams, 6 Pick. (Mass.) 237; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Starbuck v. Murray, 5 id. 148; Hoxie v. Wright, 2 Vt. 262; Bellows v. Ingham, id. 575; Mayhew v. Thatcher, 6 Wheat. (U. S.) 129; Wheeler v. Raymond, 8 Cok. (N. Y.) 311; Price v. Higgins, 1 Litt. (Ky.) 276; Moore v. Spackman, 12 S. & R. (Penn.) 287.

[27] Bissel v. Briggs, 9 Mass. 469; Pawling v. Bird, 13 Johns. (N. Y.) 207. But in Starbuck v. Murray, 5 Wend. (N. Y.) 159, MARCY, J., delivering the opinion, after referring to the above case of Bissell v. Briggs, lays down the law as follows: "The court would not, in such a case, I concede, have jurisdiction over the defendant's person for any other but the direct objects of the proceedings; and so far as those were concerned, he would be subjected to the authority of the court. If a citizen of one State should go into another to claim property seized on attachment, and subject the attaching creditors to costs and expenses, which in the due course of the proceedings, should be adjudged to them by a court of com-

If the party, by an act of lawless violence on the part of a few citizens of a particular State, is seized and brought within its jurisdiction from another State, it has been held that he may, nevertheless, be subjected to the jurisdiction of the courts of the State into which he is so brought.[28]

Where the record of a foreign judgment states that the defendant appeared by attorney, this will be *prima facie* evidence of the fact, and the attorney will be presumed to have been regularly constituted.[29]

petent authority, will it be pretended that he could resist the payment of these costs on the ground that he was not subject to the jurisdiction of the court? For all the fair and direct objects of the suit, he was within its jurisdiction. So if the proceedings were not *in rem*, but the property of the defendant was attached to compel him to appear and answer to proceedings *in personam*, and he did in fact appear and litigate the cause with the plaintiff, he could not be heard to question the jurisdiction of the court over his person. I do not think Chief Justice PARSONS intended to say more than this, that when a court had the jurisdiction of a defendant for one purpose, it could not legally bind him by a judgment or sentence in a distinct and different manner." See Moore v. Spackman, 12 S. & R. (Penn.) 287.

[28] State v. Smith, 1 Bailey (S. C.), 283; Id. 290, note *a*.

[29] Corbitt v. Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586; Malony v. Gibbons, 2 Camp. 502. See Robinson v. Eaton, 1 T. R. 62; Tipton v. Mayfield, 10 La. 189. So, with respect to judgments as among the neighboring States. Field v. Gibbs, 1 Pet. (U. S. C. C.) 155; Hall v. Williams, 6 Pick. (Mass.) 232; Aldrich v. Kinney, 4 Conn. 380; Starbuck v. Murray, 5 Wend. (N. Y.) 148; Hoxie v. Wright, 2 Vt. 263; Shumway v. Stillman, 6 Wend. (N. Y.) 447. But as we have already seen, some diversity of opinion exists whether this statement of appearance in the record of a neighboring State may be contradicted. In Field v. Gibbs, 1 Pet. (U. S. C. C.) 155, it was held it could not, on the general principle forbidding the impeachment of records. So also, in Vermont, Hoxie v. Wright, 2 Vt. 263, 268; and in Massachusetts, to a qualified extent only, however. Hall v. Williams, 6 Pick. (Mass.) 232. But in New York and Connecticut, the direct contrary has been held; and in the former State the broad ground is taken that every fact stated in the record upon which jurisdiction depends, may be controverted. Starbuck v. Murray, 5 Conn. 380; Barber v. Winslow, 12 Wend. (N. Y.) 102; Shumway v. Stillman, 6 id. 447; Bradshaw v. Heath, 13 Wend (N. Y.) 407, 418. If the defendant appears and pleads, though his appearance be entered informally on the record, the judgment will bind him. Bank of Middletown v. Huntington, 13 Abb. Pr. (N. Y.) 402.

In an English case, the validity of judgments rendered against persons, who were non-residents, and had no actual notice of the suit, and did not appear and answer the same, came before the court of common pleas of England, upon a Scottish judgment rendered against a Scottish absentee, upon due attachment of his heritable property in Scotland, and due proclamation by what there is technically called *horning*, and a judgment by default for non-appearance. An action of debt was brought on the judgment, and the question was, whether it was void or not. It was held, that it was valid. This was partly the result of the articles of union between Scotland and England, and partly of the recognition of such practice, as valid, by a British act of parliament; and

Thus far, to avoid unnecessary prolixity, we have treated of foreign judgments and judgments as among the neighboring States of the Union, without discriminating very particularly, except in a few instances, between the two classes; for, in regard to the matters relating to jurisdiction which we have noticed, there is seldom a discernible shade of difference between them. The latter class, however, owing to the provisions of the act of congress and the constitution, before referred to, may, perhaps, with respect to some other particulars under this head, claim a distinct and separate consideration.

Where the legislature of a State has undertaken to confer upon its courts the power of exercising jurisdiction over the persons of the citizens of other States, who have in no sense subjected themselves to its authority, nor been within its territory, we have seen that all judgments rendered in pursuance of such regulations will be held utterly void. The legislature, the principal, having no jurisdiction, can confer none upon its agents, the courts.[30] But, in respect to its own resident citizens, it is undoubtedly competent for the legislature to prescribe such mode of judicial proceeding as it may deem proper; to direct the manner of serving process, the notice which shall be given to defendants, and to declare the effect of a judgment rendered in pursuance of such notice.[31] Should a

partly also of the fact that the judgment was against a Scottish subject. BEST, J., who delivered the opinion of the court, said: "A natural born subject of any country, quitting that country, but leaving property under the protection of its laws, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation. The deceased, before he left his native country, acknowledged under his hand, that he owed the debts; he was under a moral obligation to discharge those debts as soon as he could." After adverting to the case of Buchanan v. Rucker, and some others, he added: "To be sure if attachments issued against persons who were never within the jurisdiction of the court issuing them, could be supported and confirmed in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the right of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." Douglass v. Forrest, 4 Bing. 686. See, also, Meeus v. Thelluson, 20 Eng. L. & Eq. 465; Gould v. Webb, 82 Eng. C. L. 932, 76 id. 787.

[30] *Per* CATRON, J., Earthman v. Jones, 2 Yerg. (Tenn.) 484.

[31] *Per* WILLIAMS, J., Beech v. Abbott, 6 Vt. 591. See, also, Douglas v. Forrest, 4 Bing. 866, *per* BEST, C. J.

State, then, adopt absurd or unjust provisions in this respect, and give full jurisdiction to its courts over resident citizens without requiring any thing more than a constructive notice to them; should it allow, for instance, the rendition of a judgment, after service of process upon the property of the defendant, or by publication of notice in the newspapers, or by affixing the same against the door of a court-house or church, and declare such judgment final and conclusive, what would be its effect in a neighboring State? If it were a strictly *foreign judgment,* it might, perhaps, be treated as a nullity, provided there was clearly no appearance, and no opportunity of defending; but such is not the case. It is now settled, by as strong and unbroken a current of authority as can be brought to bear in favor of any position, that the several States in this respect are not foreign to each other; that the effect to which the "acts, records and judicial proceedings" of one State are entitled in the courts of a neighboring State, does not depend upon volition or comity as among the respective members of the Union, but is defined and peremptorily enforced by the paramount sovereignty of the Federal government. Many of the decisions seem at a first glance to maintain the doctrine that judgments obtained without personal notice to the defendant, and without any opportunity afforded him of contesting the plaintiff's claim, would not come within the general rule, but constitute an exception to the provisions of the constitution and the act of congress.[32] But on examination it will be seen that these authorities all relate to cases where the person against whom the judgment was pronounced was a resident citizen of another State when the suit was commenced, and had contracted no allegiance to the sovereignty where the court sat, nor given it any power over him. They proceeded upon the total absence of jurisdiction in the court not only, but the sovereignty under which the court acted and the absolute impossibility of acquiring jurisdiction without the party's

[32] Aldrich v. Kinney, 4 Conn. 380; Kibbe v. Kibbe, Kirby (Conn.), 119; Robinson v. Ward, 8 Johns. (N. Y.) 86; Fenton v. Garlick, id. 194; Kilburn v. Woodworth, 5 id. 37; Borden v. Fitch, 15 id. 121; Pawling v. Bird, 13 id. 192; Starbuck v. Murray, 5 Wend. (N. Y.) 148; Holbrook v. Murray, id. 161; Shumway v. Stillman, 6 id. 447; Wheeler v. Raymond, 8 Cow. (N. Y.) 311; Andrews v. Montgomery, 19 Johns. (N. Y.) 162; Bartlett v. Knight, 1 Mass. 401; Jacobs v. Hull, 12 id. 25; Bissell v. Briggs, 9 id. 462; Hall v. Williams, 6 Pick. (Mass.) 232; Woodward v. Tremere, id. 354; Dennison v. Hyde, 6 Conn. 508; Rogers v. Coleman, Hardin (Ky.), 413.

consent in such cases. The question, therefore, as to judgments rendered in accordance with the local law by a State court against its *resident citizens*, over whom it has exclusive sovereignty, did not arise and was not discussed.[33]

[33] Thurber v. Blackbourne, 1 N. H. 242.

In a New Hampshire case, BELL, J., delivering the opinion of the court, lays down a position which, if correct, would indiscriminately exempt *all* judgments of other States from the operation of the act of congress and the constitution, provided they were obtained without personal notice to the defendant and an opportunity afforded him of defending. "The words *records and judicial proceedings*," he says, "are words of definite meaning at common law, and by settled legal rules in the construction of statutes they are to have the same meaning attached to them when used in this statute. The common law never recognized judicial proceedings as foreign *judgments*, unless rendered by a court of record upon personal notice given to the defendant, or his appearance to the action. Without these requisites, such foreign judgment is a mere nullity, and does not afford even *prima facie* evidence of a debt. Fisher v. Lane, 3 Wilson, 303; Buchanan v. Rucker, 9 East, 192. The judicial proceedings or judgments contemplated by the act of 1790, were, therefore, not judgments rendered without notice to the defendant or appearance to the action, but judgments which were recognized and enforced at common law as foreign judgments. Judgments of the courts of record of one State, rendered without notice or appearance of the defendant, when sued in the courts of another State, are therefore not affected by the statute of 1790, but remain, as at common law, mere nullities, unless within the jurisdiction where they were rendered. And see Hall v. Williams, 10 Me. 278. A similar doctrine has been acted upon in Indiana. Thus, in an action on a Kentucky judgment, Holt v. Alloway, 2 Blackf. (Ind.) 108, the defendant pleaded that the judgment was obtained against him on a recognizance of special bail without any notice having been served on him, and without any *ca. sa.* having been issued against his principal. To this plea there was a general demurrer, which was overruled and judgment given for the defendant, because no *ca. sa.* had gone. The court, after observing that the judgment of a neighboring State may be impeached for fraud, or for want of jurisdiction, say: "The cause under consideration does not belong to either of those classes of cases. On the one hand, it is a case to which, for want of personal notice, the act of congress giving to the judgment of one State when sued upon in another, the same conclusive effect as it has where rendered, does not properly apply. That act is based upon the principle that the merits of a cause once fairly and fully tried and determined in one State should not be subject to the subsequent investigations and decisions of the courts of other States; but a judgment rendered, like the one in question, in the absence of the defendant, and without any personal notice to him of the suit, cannot be said to have been thus fairly obtained, and consequently does not come within the principle of the act of congress. On the other hand, although the defendant had no personal notice of the original suit, yet it does not appear but that he was a resident of the State of Kentucky when the action was commenced, and that the judgment was recovered in conformity with the laws of that State, we would not, it is conceived, be warranted in determining that the court had no jurisdiction. We are, therefore, of opinion, that according to the facts on record, the judgment in this case must be viewed not as conclusive, for the want of personal notice; not as absolutely void, since the defendant must be presumed a resident of Kentucky when the suit was commenced, and amenable to its laws; but we must consider it as a *foreign* judg-

Notwithstanding some respectable opinions to the contrary, it may be said that in order to give the constitution and act of congress their legitimate effect, both principle and authority require that the judgment of a neighboring State should be treated in all respects as though the court before which it is brought were sitting and acting under the laws of the State where it was rendered.[34] If it would be conclusive there, it should be held equally so in every other State. An exception to the generality of this proposition might very properly be allowed where the local law, in virtue of which the court rendering the judgment proceeded, infringed upon the sovereignty of other States with regard to their own citizens; but thus qualified, it will be found to be fully sustained.[35]

ment and *prima facie* evidence of the debt. It is *per se* a cause of action, and may be declared on as in the present case without setting forth the original demand. Its justice, however, is subject to be impeached; and it may be shown to have been unduly or irregularly obtained. See Cone v Cotton, 2 Blackf. (Ind.) 82; Elliott v Ray, id. 31.

[34] Hinton v. Townes, 1 Hill (N. Y.), 439; Hunt v. Lyle, 8 Yerg. (Tenn.) 142.

[35] Glenn v. Williams, 60 Md. 98; Allison v. Chapman, 19 Fed. Rep. 488; Clark v. Child, 136 Mass. 844. Judgments of other States have no extra territorial force *as* judgments. Elizabeth Savings Inst. v. Gerber, 34 N. J. Eq. 130.

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